LIBRARY
SUPREME COURT, U. S.

No. 73-241

Supreme Court, U. S.
FILED
197
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1973

CHICAGO MERCANTILE EXCHANGE,
Petitioner

vs.

DARRYL B. DEAKTOR,
Respondent

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner

vs.

AL PHILLIPS, JR., et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEE A. FREEMAN
LEE A. FREEMAN, JR.
JEROLD E. SALZMAN
Attorneys for
The Chicago Mercantile Exchange

FREEMAN, FREEMAN & SALZMAN
One IBM Plaza—Suite 3200
Chicago, Illinois 60611
Telephone: (312) 467-6540

© The Scheffer Press, Inc.—(312) 263-2850

TABLE OF CONTENTS

	PAGE
PETITION	1
DECISION BELOW	1
JURISDICTION	2
ISSUE PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES THE EXPRESS HOLDING IN *RICCI* v. *CHICAGO MERCANTILE EXCHANGE*, 409 U.S. 289 (1973)	5
a. The Question Whether The Chicago Mercantile Exchange Fulfilled Its Statutory Duty Of Self-Regulation Or Failed To Enforce Its Rules Should Be First Considered By The Commodity Exchange Commission	5
b. The Seventh Circuit Erred By Holding That The Self-Regulatory Action By CME Is Not "Arguably Protected" By The Commodity Exchange Act	7
c. The Seventh Circuit Erred By Likening These Cases To A Private Fraud Action Under The Securities Laws	9
II. THE SEVENTH CIRCUIT'S DECISION CREATES A SITUATION THAT WILL DISRUPT SELF-REGULATION OF THE COMMODITY FUTURES MARKETS	10

PAGE

III. THIS COURT MUST RESOLVE THE CONFUSION ARISING FROM THE CONFLICT WITHIN THE SEVENTH CIRCUIT BETWEEN THE DECISION BELOW AND THE EARLIER DECISION IN *RICCI* v. *CHICAGO MERCANTILE EXCHANGE*, 447 F.2d 713 (7th Cir. 1971) 12

CONCLUSION 14

TABLE OF AUTHORITIES

Deaktor v. *The Chicago Mercantile Exchange*, No. 71-1893 (7th Cir. 1973) 1

Mash v. *Chicago Mercantile Exchange*, No. 71 C 2588 (N.D. Ill. 1973) 13

Phillips v. *The Chicago Mercantile Exchange*, No. 71-1892 (7th Cir. 1973) 1

Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) 2, 5, 9, 10, 13

Ricci v. *Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir. 1971) 2, 12

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 9

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

CHICAGO MERCANTILE EXCHANGE,
Petitioner

vs.

DARRYL B. DEAKTOR,
Respondent

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner

vs.

AL PHILLIPS, JR., et al.,
Respondent

PETITION

The Chicago Mercantile Exchange ("CME") respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on May 21, 1973, in *Deaktor* v. *Chicago Mercantile Exchange*, No. 71-1893, and *Phillips* v. *Chicago Mercantile Exchange*, No. 71-1892.

DECISION BELOW

The decision of the Court of Appeals has not yet been officially reported. The majority and concurring opinions are printed as Appendix A. A petition for rehearing en

banc was denied by order of June 26, 1973. A motion to recall and stay the mandate was denied by order of July 11, 1973.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

ISSUE PRESENTED

Whether the Seventh Circuit's decision conflicts with *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) ("Ricci"). This, in turn, involves two related questions:

(a) Does the *Ricci* decision preclude the Seventh Circuit's conclusion that the self-regulatory conduct of CME is "not arguably" protected by the Commodity Exchange Act.

(b) Did the Court of Appeals misconstrue *Ricci* by holding that the doctrine of primary jurisdiction did not apply to these complaints because plaintiffs alleged violation of a rule enacted by the CME, rather than attacking the rule itself.

STATEMENT OF THE CASE

The Chicago Mercantile Exchange ("CME") seeks reversal of the decision rendered by the Court of Appeals for the Seventh Circuit in these consolidated cases. That decision affirmed the trial court's refusal to apply the doctrine of primary jurisdiction expressed in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) *aff'g*, 447 F.2d 713 (7th Cir. 1971), and to refer the charges against CME to the Commodity Exchange Commission ("Commission") for initial consideration.

The allegations made against CME, as distinct from the defendant traders, may be summarized as follows:

Deaktor

After trading in July 1970 frozen pork belly futures had closed, CME instituted disciplinary proceedings against several members who had long positions in the market, charging them with having violated various rules of CME and with having manipulated July 1970 frozen pork belly futures prices. Hearings were conducted for six weeks before the full twelve-man CME Board of Governors, and severe penalties were imposed, including revocation of clearing house membership, suspensions from trading for up to three years, and substantial fines. Nevertheless, suit was filed by traders with short positions in the market charging that CME had failed to enforce its rules by not acting earlier to prevent a manipulation. The plaintiffs accuse CME of failing "to exercise reasonable care" in compliance with 7 U.S.C. §7a(8) and to act promptly to stop "the manipulative activities of the other defendants." (Complaint, ¶20).

Phillips

This case arises from an order by CME that certain clearing members liquidate fifty percent (50%) of their open interests *during* the March contract trading month to insure a free and competitive market. CME issued this order following a determination that the liquidity of March 1970 fresh eggs futures contracts was threatened. Thereafter, traders with long positions filed suit charging that CME (and some of its officers) violated the antitrust laws and the Commodity Exchange Act ("CEA") by this prompt move to prevent manipulation.

Thus, traders on the "wrong" side of the market seek to condemn the statutorily imposed self-regulation action of CME for taking action during the contract month in *Phillips* and for not taking action until contract trading ended

in *Deaktor*. The crucial issue raised by both complaints is whether CME adequately discharged its statutory duty of self-regulation.

The opinion below recited the following reasons given by this Court for its decision in *Ricci* that "the antitrust action should be stayed until the administrative officials have had opportunity to act":

> "(1) that it would be essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of the antitrust action,' . . . ; (2) that some facets of the dispute between Ricci and the Exchange [were] within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promise[d] to be of material aid in resolving the immunity question." (Appendix 5a)

The Seventh Circuit further acknowledged that the issues in these cases depend upon whether the alleged action violated CME's rules and that this determination:

> "in turn involved issues of fact and questions concerning the scope and significance of the rules. These were matters which the [Supreme] Court thought could best be dealt with by those especially familiar with the customs and practices of the industry." (Appendix 6a)

But after setting forth the foregoing reasons why the doctrine of primary jurisdiction should apply, the Court of Appeals, in the instant cases, refused to follow the *Ricci* holding on the ground that because both complaints could be read to charge manipulation, "the conduct alleged in the present case is in no way arguably protected by the rules of the Chicago Mercantile Exchange or the Commodity Exchange Act," and that the exercise of primary jurisdiction was therefore unnecessary. (Appendix 11a).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION CONTRAVENES THE EXPRESS HOLDING IN RICCI v. CHICAGO MERCANTILE EXCHANGE, 409 U.S. 289 (1973)

The complaints in these cases attack the manner in which the CME discharged its duty of self-regulation under the Commodity Exchange Act to maintain freely competitive futures markets. This issue presents the clearest case for the exercise of primary jurisdiction under the rationale of *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973).

The Court of Appeals failed to draw the line between the self-regulation of CME in seeking to prevent action which might be manipulative and the trading activities of other defendants who are charged with the manipulations. We only contend that the primary jurisdiction of the Commission may be invoked in considering whether CME properly enforced its rules.

a. The Question Whether The Chicago Mercantile Exchange Fulfilled Its Statutory Duty Of Self-Regulation Or Failed To Enforce Its Rules Should Be First Considered By The Commodity Exchange Commission.

As this Court noted in *Ricci*, the crux of the commodity futures market regulatory system is the Congressional policy that imposes on designated contract markets, broad self-regulation responsibilities subject to agency control and judicial review. Futures trading in specified agricultural commodities may not legally occur except on gov-

ernment designated contract markets. In order to qualify as a contract market an exchange must adopt and file with the Secretary of Agriculture ("Secretary"), subject to his disapproval, rules of trading including rules to prevent manipulations and corners. The Commodity Exchange Act then requires the contract market to:

> "[E]nforce all • • • rules • • • which relate to terms and conditions in contracts of sale • • • or relate to other trading requirements and which have not been disapproved by the Secretary • • •." (7 U.S.C. §7a(8))

Failure of CME to enforce these rules, or failure to comply with any provision of the Commodity Exchange Act or regulations of the Secretary or Commission may result in (i) suspension or revocation of its designation as a contract market, or (ii) a cease and desist order, the violation of which may subject the contract market, its officers, and agents to fine and imprisonment. (7 U.S.C. §§7b, 13a). The Commodity Exchange Act and regulations issued thereunder, upon petition by individuals such as plaintiffs that CME failed to enforce or violated its rules, provide for disciplinary hearings by the Commission and judicial review. (7 U.S.C. §8(a), 17 C.F.R. §0.50-0.95).

The *Phillips* plaintiffs complain that CME, through its Business Conduct Committee during the March contract month, took action to prevent manipulation and cornering of the egg futures market by the longs (such as plaintiffs). This conduct was not only "arguably protected" by the Commodity Exchange Act, it was mandated by Section 7a(8). That statute requires CME to adopt rules and exercise self-regulatory powers to prevent manipulation. The Secretary and Commission supervise and control CME's self-regulatory functions on a day-to-day basis; they should review the issues raised in these cases before the federal courts entertain suit against CME.

With the advantage of hindsight (and a prosecution by CME itself), the *Deaktor* plaintiffs complain that CME took insufficient steps to discipline rather than to prevent in advance, a manipulation of the pork bellies market. A proper appraisal of this contention again requires administrative review to delineate CME's duty to initiate measures to remedy alleged manipulations and to determine the reasonableness, in the light of the technical nature of commodity futures markets, of CME's self-regulatory procedures. Under the guidelines of *Ricci*, the determination whether CME's self-regulatory measures were adequate or proper must first be made by the agency having immediate supervision of CME's duties in this respect. Conseseqently, the Seventh Circuit's decision should be reversed.

b. The Seventh Circuit Erred By Holding That The Self-Regulatory Action By CME Is Not "Arguably Protected" By The Commodity Exchange Act.

Accepting the cursory allegations by plaintiffs, and ignoring the denials of CME, the Court of Appeals indulged in the presumption that CME violated the Commodity Exchange Act or some of its own rules. Upon this premise, the Court of Appeals then reasoned that the CME's actions were not even arguably protected by the Commodity Exchange Act, and so the case was not controlled by *Ricci*.

The Seventh Circuit's attempt to distinguish *Ricci* rests upon a misconception of underlying facts. The Court of Appeals thought that these cases were "unlike *Ricci*" because:

> "The plaintiffs do not allege that any rule of the Chicago Mercantile Exchange is in violation of the antitrust laws or even the Commodity Exchange Act. They simply allege that past conduct by the Exchange and certain of its members, alleged to violate rules of the

> Exchange and the Commodity Exchange Act, caused them monetary injury for which they seek damages." (Appendix 7a)

But the cause of action in *Ricci* was also based upon alleged violations of CME's rules and the Commodity Exchange Act. As this Court summarized the complaint in *Ricci*:

> "Allegedly, this course of conduct violated both the rules of the Exchange and the Commodity Exchange Act and was pursuant to an unlawful conspiracy aimed at restraining the conduct of Ricci's business." 409 U.S. at 290-291

Moreover, the Seventh Circuit's approach begs the critical question. The factual dispute whether CME has violated any statute, regulation, or rule is precisely the type of issue that *Ricci* says should be referred to the Commodity Exchange Commission under the doctrine of primary jurisdiction. As stressed by Justice White, Congress has established a "specialized agency" to determine either that "a rule has been violated or that it has been followed." 409 U.S. at 307. The Seventh Circuit acknowledged but ignored the *Ricci* holding that prior Commission jurisdiction was "warranted in order to gain an agency ruling on whether the alleged Exchange action was in accord with Exchange rules." (Appendix 8a).

Whether traders in eggs (*Phillips*) and pork bellies (*Dealtor*) engaged in illegal manipulation has no relevance to the cause of action being asserted against CME. The Seventh Circuit's opinion fails to distinguish between the allegations of manipulation lodged against certain traders and the complaint made against CME of failing to enforce its rules. The concurrence falls into the same error by defining the "main issue common to all these

appeals" and "whether a manipulation of prices occurred." (Appendix 17a). With regard to CME, however, the crucial issue is whether it took appropriate action to regulate and prevent alleged manipulations and corners of the market. This issue is one that must be reserved to the administrative agency which has statutory authority to review and discipline such regulatory conduct by CME.

c. The Seventh Circuit Erred By Likening These Cases To A Private Fraud Action Under The Securities Laws.

Having viewed the complaints as simply alleging violations of CME rules, the Court of Appeals concluded that these cases could be treated just like any private damage suit for "violations of the securities acts." (Appendix 6a). The further fact that the Seventh Circuit viewed this case as a garden-variety dispute between traders again underscores its failure to appreciate the unique position of CME and the fact that special rules of primary jurisdiction have developed in suits brought against stock exchanges and commodities markets operating under a statutorily mandated duty of self-regulation. The Seventh Circuit's holding directly conflicts with *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), as that decision was construed and applied in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). This Court pointed out in *Silver:*

> "Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling * * * a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." (373 U.S. at 358, n. 12)

Thereafter, this Court held that actions against commodity futures markets fall within the category of situations that

Silver reserved for primary jurisdiction because the Commodity Exchange Act grants the Commission authority to review CME's enforcement of its rules. *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. at 302. The basis for this Court's decision in *Ricci* compels reversal of the holding below.

II.

THE SEVENTH CIRCUIT'S DECISION CREATES A SITUATION THAT WILL DISRUPT SELF-REGULATION OF THE COMMODITY FUTURES MARKETS.

Despite the heavy responsibility of congressionally imposed self-regulation upon contract markets, every action or decision of the contract market is susceptible to attack as being a concerted action to restrain trading. Such attacks cannot be permitted if the regulatory system is to work. Mr. Justice Stewart, dissenting in *Silver*, pointed to this danger facing a self-regulation system:

> "It may be assumed, I think that almost every exercise of an exchange's statutory duty of self-regulation would involve an actual or threatened concerted refusal to deal—a 'group boycott.'" (373 U.S. at 367, n. 1)

If the federal court entertains these cases without prior resort to the agency, precedent would be created for repeated imposition of complex and costly judicial proceedings against contract markets in every situation where self-regulatory action is taken or a decision made by contract markets, even though *bona fide* and within the sphere of their mandated duties. Indeed, the dilemma facing the CME in *Deaktor* and *Phillips* was stressed to this Court in the brief and oral argument when *Ricci* was decided.

A delicate balance must be struck to create a climate in which contract markets will be encouraged to bear the burdens and responsibilities of self-regulation, unstifled by the constant threat of harassing suits, and yet with ultimate responsibility to answer for their derelictions. This balance can be best evolved by the agency having the express regulatory authority to assure that the designated contract markets are properly enforcing their filed and operative rules.

Newly proposed regulations of the Commodity Exchange Authority underscore the significance of the dilemma facing CME. On July 10, 1973, the Administrator of the Commodity Exchange Authority published proposed requirements for contract markets to enforce statutory and regulatory requirements and to enforce their rules. 38 *Federal Register,* pp. 18469-18470. Section 1.51 of these proposed regulations provides, in part:

> "(a) Each contract market shall use due diligence in maintaining a continuing affirmative action program to secure compliance with all of the provisions of sections 5, 5a, 5b, 6(a) and 6b of the Act (7 U.S.C. 7, 7a, 7b, 8, 13a) and with all of the contract market's by-laws, rules, regulations and resolutions referred to therein. Such program shall include:
>
> • • •
>
> (7) A procedure which results in the taking of prompt, effective disciplinary action for any violation which is found to have been committed."

The Chicago Mercantile Exchange has thus been put in an intolerable position. It must diligently seek to prevent, deter, and punish violations of its rules; but enforcement of its rules now exposes it to unrestricted attacks in federal courts by disgruntled traders. This situation will disrupt, if not immobilize, the self-regulatory machinery es-

tablished by the Commodity Exchange Act. The doctrine of primary jurisdiction expressed in *Ricci* was designed to alleviate this dilemma.

III.

THIS COURT MUST RESOLVE THE CONFUSION ARISING FROM THE CONFLICT WITHIN THE SEVENTH CIRCUIT BETWEEN THE DECISION BELOW AND THE EARLIER DECISION IN RICCI v. CHICAGO MERCANTILE EXCHANGE, 447 F.2d 713 (7th Cir. 1971).

On facts substantially identical to this case, a differently constituted Court of Appeals held in *Ricci* v. *Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir. 1971), that a complaint against CME for violation of its own rules and regulations should be stayed pending review by the "Commodity Exchange Commission and/or the Secretary of Agriculture" under the doctrine of primary jurisdiction. The Court of Appeals there stressed:

> "Moreover, the questions here involved are precisely the ones that the Commission and the Secretary are to resolve in fulfilling their watchdog function over the Exchange and its members." 447 F.2d at 719.

The instant panel of the Court of Appeals sought to distinguish *Ricci* on the ground that the particular conduct alleged to violate the antitrust laws in *Phillips* also was a violation of the Commodity Exchange Act and "there would therefore be no possible conflict between the antitrust laws and the Commodity Exchange Act." (Appendix 11a). This, of course, still begs the ultimate question: whether the conduct of CME in fact violated the Commodity Exchange Act. But even were the complaint viewed as not involving antitrust considerations, the dispute would then become one that involves only issues "con-

cerning the scope and significance of the rules," and that presents issues which are peculiarly within the area of administrative expertise. The lack of possible conflict between the antitrust laws and Commodity Exchange Act would thus remove an argument against primary jurisdiction.

The Seventh Circuit's decision has opened the door to unrestricted attacks upon CME's self-regulatory functions. Subsequent to the *Deaktor* and *Phillips* decision, the District Court refused to follow *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), in an antitrust suit attacking the CME's rules which set terms and conditions for trading in hams. *Mash* v. *Chicago Mercantile Exchange*, No. 71 C 2588 (N.D. Ill., July 24, 1973). The trader in *Mash* charged that CME violated the antitrust laws by the enactment and enforcement of a rule for delivery on futures contracts which specified an allowance for shrinkage of frozen hams of ¼ of 1% of the certified weights delivered. The challenged rule had been filed with the Secretary of Agriculture pursuant to Section 7a(8) of the Commodity Exchange Act, and not disapproved. On the basis of *Ricci*, CME moved for a stay of proceedings until after administrative consideration. The District Court denied CME's motion.

The decision below simply cannot be reconciled with the prior decisions in *Ricci*. The same rule of law should apply to all cases which challenge the self-regulatory functions of the CME. It is essential that this Court resolve the conflict in decisions.

CONCLUSION

For the reasons set out above, this Court should grant certiorari to secure adherence to its decisions in *Ricci* and to resolve the conflict between appellate decisions.

Respectfully submitted,

LEE A. FREEMAN
LEE A. FREEMAN, JR.
JEROLD E. SALZMAN
Attorneys for
Chicago Mercantile Exchange

FREEMAN, FREEMAN & SALZMAN
One IBM Plaza—Suite 3200
Chicago, Illinois 60611
Telephone: (312) 467-6540

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

Nos. 71-1890, 71-1892, 71-1893

DARRYL B. DRAKTOR,
Plaintiff-Appellee,
v.
L. D. SCHREIBER & Co., et al.,
Defendants-Appellants,
and
AL PHILLIPS, JR., et al.,
Plaintiffs-Appellees,
v.
THE CHICAGO MERCANTILE EXCHANGE, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 1216
No. 70 C 2744
JOSEPH SAM PERRY, *Judge.*

ARGUED FEBRUARY 22, 1973 — DECIDED MAY 21, 1973

Before CASTLE, *Senior Circuit Judge,* PELL and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* These interlocutory appeals are from orders of the district court denying motions by defendant Chicago Mercantile Exchange and various

other defendants to stay action in the district court pending the exercise of primary jurisdiction by the Commodity Exchange Commission.

Darryl B. Deaktor, plaintiff in Nos. 71-1890 and 71-1893, brought a class action against the Chicago Mercantile Exchange and various members of the Exchange alleging that the defendant members manipulated and cornered the July, 1970 frozen pork bellies futures contracts market, forcing up the price of those contracts and injuring traders, such as the plaintiff, who sold short and had not liquidated their positions prior to the defendants' manipulation and thus were required to cover their positions by the purchase of contracts at inflated prices. This conduct was alleged to be in violation of 7 U.S.C. §1 *et seq.* of the Commodity Exchange Act. The Exchange was sued on the ground of failing to exercise reasonable care in compliance with 7 U.S.C. §7a(8), and thus failing to be aware of and to promptly halt the unlawful activities of the defendants. Various member defendants and the Chicago Mercantile Exchange moved for a stay of proceeding on the ground that plaintiff should first be required to seek relief from the Commodity Exchange Commission. The district judge denied these motions on August 23, 1971. On October 14, 1971, he certified this order for interlocutory appeal under 28 U.S.C. §1292(b).

The plaintiffs in No. 71-1892, Al Phillips, Jr., *et al.*, are twenty-four traders who sued the Chicago Mercantile Exchange, certain of its officers and members of its Business Conduct Committee, charging the defendants with monopolizing trading in March, 1970 fresh eggs, causing the price to fall and forcing sales at artificially depressed market prices. This conduct was alleged to violate the notice and hearing provisions in Rule 217(D) of the Rules of the Chicago Mercantile Exchange, 7 U.S.C. §§7a(8) and 13(b) of the Commodity Exchange Act, and sections 1 and 2 of the Sherman Act. Defendants' motion for a stay in proceedings was denied by the district court on September 17, 1971. This Court accepted interlocutory appeals in these cases and consolidated them.

The sole issue in these appeals is whether the district court could take jurisdiction of these actions or whether the Commodity Exchange Commission properly has primary jurisdiction over these proceedings. The defendants-appellants contend that the issue is decided, in their favor, by *Ricci* v. *Chicago Mercantile Exchange*, 41 U.S.L.W. 4097, 409 U.S. 289 (January 9, 1973). We have concluded that *Ricci* does not control these cases and that the district court was correct in refusing to stay proceedings to allow the exercise of primary jurisdiction by the Commodity Exchange Commission.

The Chicago Mercantile Exchange is a board of trade designated as a "contract market" by the Secretary of Agriculture pursuant to 7 U.S.C. §7. Designation as a contract market is required before trading in contract futures can be conducted. In order to qualify as a contract market, the Chicago Mercantile Exchange was required to file with the Secretary its rules, regulations and by-laws, including rules "for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board." 7 U.S.C. §7(d). It was required to

> "enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture . . . ." 7 U.S.C. §7a(8).

Pursuant to this requirement, the Chicago Mercantile Exchange Rule 217(C) provided that the Business Conduct Committee be charged with the duty and authority to prevent manipulation of prices and the cornering of any commodity. Rule 217(D) gives the Business Conduct Committee authority to investigate the transactions and financial condition of members, to examine their books, to prescribe capital requirements, and to issue cease and

desist orders, after notice and hearing, to members found to be engaging in conduct which is "unfair or unjust."

No specific private remedy for violations of these provisions is provided. The Act does make it a felony

> "for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, . . . or to corner or attempt to corner any such commodity, or knowingly to deliver . . . false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce." 7 U.S.C. §13(b).

Other provisions authorize the Secretary of Agriculture and the Commodity Exchange Commission to take preventive and remedial action. Thus, 7 U.S.C. §8 authorizes the Commission, after notice and hearing,

> "to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade is not enforcing or has not enforced its rules of government . . . or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Secretary of Agriculture or the Commission thereunder."

Provision is also made for the Commission to enter cease and desist orders against any contract market, director, officer, agent or employee who violates any provision of the Act or rules thereunder. Failure to obey the order is declared to be a misdemeanor. 7 U.S.C. §13a. The Secretary of Agriculture is authorized to disapprove any bylaw, rule, regulation or resolution issued or proposed by a contract market which relates to terms and conditions in contracts of sale if he finds that it will violate any of the provisions of the Act or rules thereunder. 7 U.S.C. §12a(7).

The Supreme Court considered this statutory scheme in the context of an antitrust suit alleging a conspiracy to restrain trade in the transfer of an Exchange membership in *Ricci* v. *Chicago Mercantile Exchange, supra.* The Court decided that in the circumstances there presented, the Commodity Exchange Commission should be given an opportunity to exercise jurisdiction prior to continuing the proceeding in the antitrust court. Although recognizing that the Commission could decide to refuse jurisdiction,[1] the majority of the *Ricci* Court felt that the combination of three factors present in that case outweighed this uncertainty. Those factors were (1) that it would be "essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of the antitrust action,' . . . ; (2) that some facets of the dispute between Ricci and the Exchange [were] within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promise[d] to be of material aid in resolving the immunity question." 41 U.S.L.W. at 4101.

Regarding the first factor, the Court noted that although repeal of the antitrust laws was not to be lightly assumed the Commodity Exchange Act clearly contemplated a membership organization and standards for the acquisition, retention and loss of membership. The Court reasoned that if the petitioner had lost his membership pursuant to a valid rule, the first question which the antitrust court would have to decide was whether the rule itself was immune from antitrust attack. But, the Court continued, if petitioner Ricci lost his membership in contravention of Exchange rules, "the antitrust action should very likely take its normal course, absent more compelling indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commodity Exchange Commission are exclusive." *Id.* at 4102.

---

[1] 41 U.S.L.W. at 4102.

Looking at the second factor underlying its decision, the Court, while expressly declining finally to decide the jurisdictional question, noted that the Court of Appeals had found that the membership rules of the Exchange were related to "trading requirements" and "were thus among those rules which the Exchange could not ignore without violating the Act and bringing itself within the jurisdiction of the Commission" to remedy any violation of the statute and underlying rules. *Id.*

The Court also decided that a prior determination by the Commodity Exchange Commission would be of material aid in resolving the immunity question because the issue turned in the first instance on whether the loss of Ricci's membership violated the Exchange rules, which in turn involved issues of fact and questions concerning the scope and significance of the rules. These were matters which the Court thought could best be dealt with by those especially familiar with the customs and practices of the industry. The Court concluded that with the aid of administrative action, if the conduct alleged was in accord with a valid rule, "the antitrust court will be in position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits." *Id.* at 4103.

It can readily be seen that, except for the antitrust claim in No. 71-1892, these cases are unlike *Ricci* in one significant respect, in that the district court is not being asked to reconcile the possibly conflicting policies of two congressional acts. Rather, insofar as these actions are founded on alleged violations of the Commodity Exchange Act itself, the district court is simply being asked to do what it has traditionally been called upon to do in cases involving alleged violations of the securities acts, that is, to award monetary compensation to remedy the harm done by unlawful conduct. Therefore, if a private action exists under the Commodity Exchange Act, no reason appears why the discretionary jurisdiction of the Commission should be invoked prior to judicial proceedings,

any more than the jurisdiction of any other agency need generally be invoked before commencing a private damage action. The plaintiffs do not allege that any rule of the Chicago Mercantile Exchange is in violation of the antitrust laws or even the Commodity Exchange Act. They simply allege that past conduct by the Exchange and certain of its members, alleged to violate rules of the Exchange and the Commodity Exchange Act, caused them monetary injury for which they seek damages.

It is argued, however, that although no conflicting policies between two acts are here involved, primary jurisdiction should nevertheless be held to rest in the Commodity Exchange Commission on account of the difficult questions involved, which may require expertise beyond that of the average judge or juror, and because of possible conflicts in the law resulting from the opinions of different judges. The latter point may be answered by noting that the personnel, policies and views of administrative agencies and commissions do not remain forever constant. Conflicts arise in agency interpretations of law as well as within the courts. Furthermore, there is no reason to believe that more conflicts will result from judicial intervention in this area than in any other more traditional sphere of judicial activity. Finally, inasmuch as affording the Commission primary jurisdiction would not mean exclusive and final jurisdiction, there is no reason to conclude that whatever conflicts in the law may arise would be avoided by prior Commission action.

The argument that the Commission's expertise is needed and that judges and jurors would be unable to understand the issues involved may be answered in two ways.[9]

---

[9] Appellants cite *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952), in which the Supreme Court stated, in deciding that the Federal Maritime Board should be given primary jurisdiction in an antitrust case, that "in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."

First, deference to an administrative commission solely on the basis that lay persons will be unable to understand the proceedings had been shown by experience to be unwarranted. Judges and juries regularly decide patent cases, antitrust claims and complicated securities cases. There is no reason to believe that they would have more difficulty with factual issues involving the purchase and sale of commodities. If issues do become too complex for the average juror, special instructions or the aid of a special master can be utilized. Secondly, the issue is not primarily whether an agency has special expertise as such, but "whether some parts of the case are within the exclusive jurisdiction of the agency." 3 Davis, Administrative Law §19.07 at 39 (1958). The Supreme Court in *Ricci* found prior Commission jurisdiction warranted in order to gain an agency ruling on whether the alleged Exchange action was in accord with Exchange rules. It stated, however, that should the Commission find that the Exchange action violated these rules, its jurisdiction would end, and "the antitrust action should very likely take its normal course, *absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commodity Exchange Commission are exclusive.*" 41 U.S.L.W. at 4102 (emphasis added). Inasmuch as the defendants in the cause of action under consideration here are alleged to have violated valid rules, and the Supreme Court has strongly indicated that the Commodity Exchange Commission's jurisdiction is limited and non-exclusive, we see no reason to require the plaintiffs to invoke the discretionary jurisdiction of the Commission.

There remains the question whether private damage actions are allowable under the Commodity Exchange Act. As noted earlier, no express provision is contained in the Act. The courts which have considered the question, however, have apparently uniformly concluded that such an action exists. *E.g., Booth* v. *Peavey Co. Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.

N.Y. 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); *United Egg Producers* v. *Bauer Int'l Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967); 1 Bromberg, Securities Law: §4.6 (353) (1971). The rationale was stated in *Goodman*, *supra*, 265 F. Supp. at 447:

> "Violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect. Restatement, Torts, Section 286."

The purpose of the Commodity Exchange Act has been stated to be "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 Geo. Wash. L. Rev. 215, 223 (1958). It is a felony under 7 U.S.C. §13(b) of the Act to manipulate or attemt to manipulate the price of any commodity or to corner or attempt to corner any such commodity. We think the enactment is at least in part intended to protect the interests of the plaintiff-traders in these actions. We therefore hold that a private cause of action exists under the Commodity Exchange Act in favor of the plaintiffs in these actions and that the district court was correct in permitting the plaintiffs to maintain their actions under the Commodity Exchange Act.

The issue of the antitrust allegation in *Phillips* v. *Chicago Mercantile Exchange* is somewhat more complicated. The Supreme Court in *Ricci* v. *Chicago Mercantile Exchange*, *supra*, did hold that an antitrust action in the dis-

trict court should properly be stayed in order to allow the Commodity Exchange Commission to rule on the question whether the Chicago Mercantile Exchange actions were in accord with valid rules promulgated under the Commodity Exchange Act. We think, however, that the difference in approach to that case by the Court of Appeals and the Supreme Court emphasizes how the present case differs significantly from *Ricci* and that the scope of the doctrine of primary jurisdiction as applied to the Commodity Exchange Act by the Supreme Court in that case does not include the present alleged conduct. The Court of Appeals in *Ricci* found that the facts alleged by the plaintiff in support of his antitrust charge would constitute violations of the Commodity Exchange Act and thus could be examined by the Commodity Exchange Commission, stating that the maintenance of a private treble-damage suit in those circumstances would present a problem of coextensive coverage under two acts which might be repugnant to the policy of the Commodity Exchange Act. 447 F.2d 713 (7th Cir. 1971). The Supreme Court, in contrast, held that if the Commodity Exchange Commission found a violation of valid rules, that should end its inquiry and the antitrust action should proceed in the absence of greater evidence that the Commodity Exchange Action remedies were to be exclusive.

This difference in the approaches of the two Courts indicates that our inquiry must focus on the particular conduct alleged to violate the antitrust laws and must consider whether it is arguably protected by the Commodity Exchange Act. In *Ricci*, the conduct was the transfer of a membership in the Chicago Mercantile Exchange without the permission of or even notice to the owner. Although in the absence of the Commodity Exchange Act such conduct appeared to be a clear violation of the antitrust laws, the Supreme Court held that the possibility that the Commodity Exchange Act limited the applicability of the antitrust laws in that case was "substantial." The reason for this was that Congress had declared that to deal in commodity futures at all one was required to be or deal

through a member of a designated board of trade. "The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer and loss of membership." 41 U.S.L.W. at 4102. The Court noted that the Chicago Mercantile Exchange had promulgated such rules and was under the statutory duty to enforce them to the extent they were related to trading requirements. 7 U.S.C. §7a(8). In contrast, the conduct alleged in the present case is in no way arguably protected by the rules of the Chicago Mercantile Exchange or the Commodity Exchange Act. In fact, the Act expressly prohibits manipulation of commodity prices and the cornering of any commodity. There would therefore be no possible conflict between the antitrust laws and the Commodity Exchange Act unless the Commodity Exchange Act were deemed to be the exclusive means of remedying violations of the two acts. The Supreme Court, in *Ricci*, however, decided that question adversely to the petitioners.

We see no further argument for staying the actions in the district court. The orders appealed from are therefore affirmed.

AFFIRMED.

CASTLE, *Senior Circuit Judge*, concurring. The issue on this appeal is whether the district court abused its discretion in refusing to defer the issues raised by the various complaints to the primary jurisdiction of the Secretary of Agriculture or the Commodities Exchange Commission. I find no abuse of discretion, but I believe that the resolution of this issue is more difficult than the majority opinion indicates.

My understanding of the majority opinion is that deference is not warranted when the plaintiff alleges only that the defendants have violated provisions of the Commodities Exchange Act (the Act) or regulations whose validity he does not challenge. Respectfully, I believe that this approach is too mechanical for guidance beyond these

cases,[1] and perhaps not sufficiently appreciative of the problems raised by *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. ....., 93 S. Ct. 573 (1973). For the appellants have argued that the question of whether they have violated the Act and/or valid exchange regulations is precisely one for administrative determination. Since all three cases are intricately related to the issue of market manipulation, appellants urge that the determinations of relevant market conditions, the existence of price fluctuations, and the advisability and legality of their activity require the exercise of administrative expertise. Only after deferring to the administrative expertise of the Secretary or the Commission, appellants contend, can a court adequately determine whether there has indeed been a violation of the Act or the regulations promulgated pursuant to it.

Appellants' argument certainly finds support in past cases which have commanded deference in order to allow administrative agencies to make preliminary comprehensive investigations and analyses of the facts involved and to apply them to a statutory scheme. *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Trans-atlantic*, 400 U.S. 62, 68 (1970), *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498 (1958), *United States* v.

---

[1] There is support for the view that deference to administrative primary jurisdiction is not necessary when the only issues are whether a party has violated a valid statute or regulation and whether his activity is consequently clearly unlawful. *Carnation Co.* v. *Pacific Conference*, 383 U.S. 213, 222 (1966), *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 131-32 (1915), *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 668 (8th Cir. 1962). As was noted in *Crain* v. *Blue Grass Stockyards Co.*, 399 F.2d 868, 874 (6th Cir. 1968): ". . . it does not require administrative expertise to determine whether plaintiff violated rules and regulations and whether, because of such violation, defendants had the right to and did exclude plaintiff. . . ."

Western Pacific Ry., 352 U.S. 59, 64 (1956). The same rationale has been applied to the Commodities Exchange Commission's fact-finding function in *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. ....., 93 S. Ct. 573 (1973), where the court required deference to the administrative judgment of the Commodities Exchange Commission. In that case plaintiff Ricci, like the plaintiffs-appellees in the instant cases, alleged only that the Act and exchange rules had been violated. ..... U.S. at ....., 93 S.Ct. at 574. Despite the uncertainty of whether Ricci could obtain administrative adjudication of his complaint, the Court held that the Commission must make the first determination of whether valid regulations had been violated:

> That issue [of whether the transfer of Ricci's membership was in violation of the Act for failure to follow exchange rules] in turn appears to pose issues of fact, and questions about the scope, meaning and significance of exchange membership rules. These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and the unique marketplace involved in this case. They are matters typically lying at the heart of an administrative agency's task and here they appear to be matters which Congress has placed within the jurisdiction of the Commodities Exchange Commission.

..... U.S. at ....., 93 S. Ct. at 582 (footnote and citations omitted). Appellants have argued that this language mandates deference of the issues in these cases to the Commission also.[3]

---

[3] A statutory argument supporting deference can also be made. The Commodities Exchange Act currently contains three means of punishing price manipulation and other violations: suspension of a commodities exchange or member from trading (7 U.S.C. §§ 8 and 9), the issuance of cease and desist orders (§§ 13a and 13b), and the imposition of criminal penalties (§ 13; but see also § 13c(b)). Each statutory penalty requires some determination by

In *Ricci*, however, the trial judge had no occasion to pass upon the question of whether the issues involved required deference to the Commission. But both the Court of Appeals and Supreme Court opinions recognized that the very nature of the Commodities Act required that each exchange have a membership organization and criteria for the acquisition, transfer, and loss of membership. ..... U.S. at ....., 93 S. Ct. at 581. Even though the factual issues of the case were quite simple and could have been easily disposed of in a civil proceeding,[3] *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 238-39 (1971), these opinions recognized that the Commission could articulate the ways in which an exchange could validly exercise its inherent power over

---

[2] (Continued)
the Secretary that a violation of the Act has been committed before court action to enforce the penalty is allowed. Hearings are guaranteed before suspensions or the issuance of cease and desist orders; and the Secretary can refuse to refer any suspected violation for criminal prosecution if criminal sanctions would not be in the public interest. Here, however, plaintiffs are trying to impose a fourth penalty—monetary damages—which will not be subject to prior determination by the Secretary that a violation has occurred or that the imposition of a penalty would serve the public interest.

[3] Some of the factual issues which the Court identified for deference to the Commission were the questions whether Ricci's membership had been transferred to another before Ricci had revoked a transfer authorization; whether the transfer authorization was valid; whether the party who ordered the transfer had the power to do so; and whether the party ordering the transfer was indebted to Ricci. All these issues appear to be simple questions of fact. ..... U.S. at ..... n.15, 93 S. Ct. at 582 n.15.

membership,[4] and that this articulation would hopefully dispose of a preliminary issue in the task of reconciling the antitrust laws with the Commodities Exchange Act. Since the Exchange Act does not in any way give a commodities exchange or the Commission power to sanction price manipulation, and since, for reasons to be discussed below, deference to administrative expertise is not vital for defining the scope of the regulations governing the issues raised by the complaints, I do not believe that *Ricci* compels deference to administrative primary jurisdiction in these cases.

Courts have usually invoked the doctrine of primary jurisdiction where they have determined that the issues raised are within the unique expertise of administrative agencies, where the issues involve administrative discretion, and where the desire for uniformity would be frustrated by many courts reaching inconsistent decisions. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). Accordingly, a trial court asked to defer action on a matter arguably within administrative jurisdiction should consider these factors and examine the particular issues raised by the pleadings, the contribution that an administrative adjudication can make, and the effect that deferring the litigation will have upon the litigants involved. *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. at ....., 93 S. Ct. at 584 (Marshall, J., dissenting).

The complaint in *Deaktor* v. *L. D. Schreiber & Co., et al.*, a class action on behalf of all traders allegedly harmed because of artificially inflated prices, alleges that the defendants exceeded daily trading limits, held or controlled

---

[4] An examination of the exchange rules which the Court of Appeals found relevant indicates that they had little relevance to the factual questions involved. My suspicion is that the Court believed deference would allow the Commission to determine whether any unwritten rules sanctioned or prohibited the membership transfer. ..... U.S. at ..... n.11, 93 S. Ct. at 579 n.11.

net "long" positions in excess of position limits, and were responsible for manipulation of the prices of pork belly futures for July, 1970. The complaint further alleges that the Chicago Mercantile Exchange was or should have been aware of the manipulative activities and that it failed to act promptly to halt these violations of Exchange rules. All defendants' answers denied these allegations. From the complaints and arguments on appeal, it appears that the essential issues which must be adjudicated are whether the Commission had set quantitative limits for trading pork belly futures, whether the defendants exceeded these limits, whether the defendants' conduct caused unreasonable price fluctuations, and whether the exchange knew or should have known about the conduct of the defendants and should have acted to stop it. I do not think that the district court abused its discretion in determining that these issues do not require the application of administrative expertise, for they involve factual determinations within the traditional competence of juries.

The complaint in *Phillips* v. *Chicago Mercantile Exchange*, a class action brought on behalf of all traders who lost money on fresh eggs futures contracts allegedly because of the defendants' conduct, alleges that defendants violated both the antitrust laws and the Commodities Exchange Act by artificially depressing the price of egg futures for their own advantage. The complaint alleges that the defendants, acting through the Business Conduct Committee of the Chicago Mercantile Exchange, ordered parties holding contracts to buy fresh eggs to liquidate 50% of these contracts without giving these parties a hearing and without giving the liquidation order proper dissemination. As a consequence, the price of eggs was driven downward to enable the defendants to purchase sufficient egg contracts to extricate themselves from the economically undesirable position they were in before their illegal activity. The complaint further alleges that the defendants' activity was in violation of rules of the Chicago exchange relating to hearings and emergency action, constituted manipulation and the circulation of

false information as prohibited by the Act, and was an illegal conspiracy in restraint of trade. The defendants have denied all these allegations. Thus, the key issues are whether the defendants had the conspiratorial purpose alleged, whether they acted in the way alleged, and whether the harmful effects flowed from their action. Once again, I do not believe that the trial judge abused his discretion in finding these issues within the competence of his court.[5]

Given the unobtrusive nature of the facts at issue in these cases, I doubt whether deference to the Commission would add substantially to their resolution. These facts do not involve a pervasive regulatory scheme, *United States* v. *Radio Corporation of America*, 358 U.S. 334, 350 (1959), or matters within administrative discretion, *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 294 (1922), but rather a unique set of facts concerning situations which may never be repeated. The main issue common to all these appeals—*i.e.*, whether a manipulation of prices occurred—is one which the judiciary has considered itself just as competent as the Commodities Exchange Commission to pass upon. Since the term manipulation" is undefined in the Act, courts of appeal have given it meaning in the cases taken on direct appeal from Commission determinations. *Volkart Brothers Inc.* v. *Freeman*, 311 F.2d 52, 58 (5th Cir. 1962), *General Foods Corp.* v. *Branman*, 170 F.2d 220, 223-24 (7th Cir. 1948). Although

---

[5] It is also questionable whether the Commodities Exchange Commission could even take jurisdiction over the issues pertaining to whether the defendants violated the rules governing hearings and emergency action. Congress, in giving the Commission power to force exchanges to police violations of their own rules, plainly indicated that this power would not extend to the enforcement of rules and regulations "such as those governing the organization and government of the exchange. . . ." S. Rep. No. 947, 90th Cong., 2d Sess., U.S. Code Cong. & Ad. News 1673, 1681 (1968).

commentators have argued that the judicial interpretation of "manipulation" has varied from circuit to circuit, Congress has declined to substitute a statutory definition of that term for the sake of uniformity. Vogelson, *Tightened Regulation for Commodity Exchanges*, 55 A.B.A.J. 858, 860 (1969).[8] In short, it is doubtful that deference can add much to the work of a court and jury in resolving the issues concerning manipulation in the instant cases; nor does it appear that Congress regards uniformity as a compelling consideration.

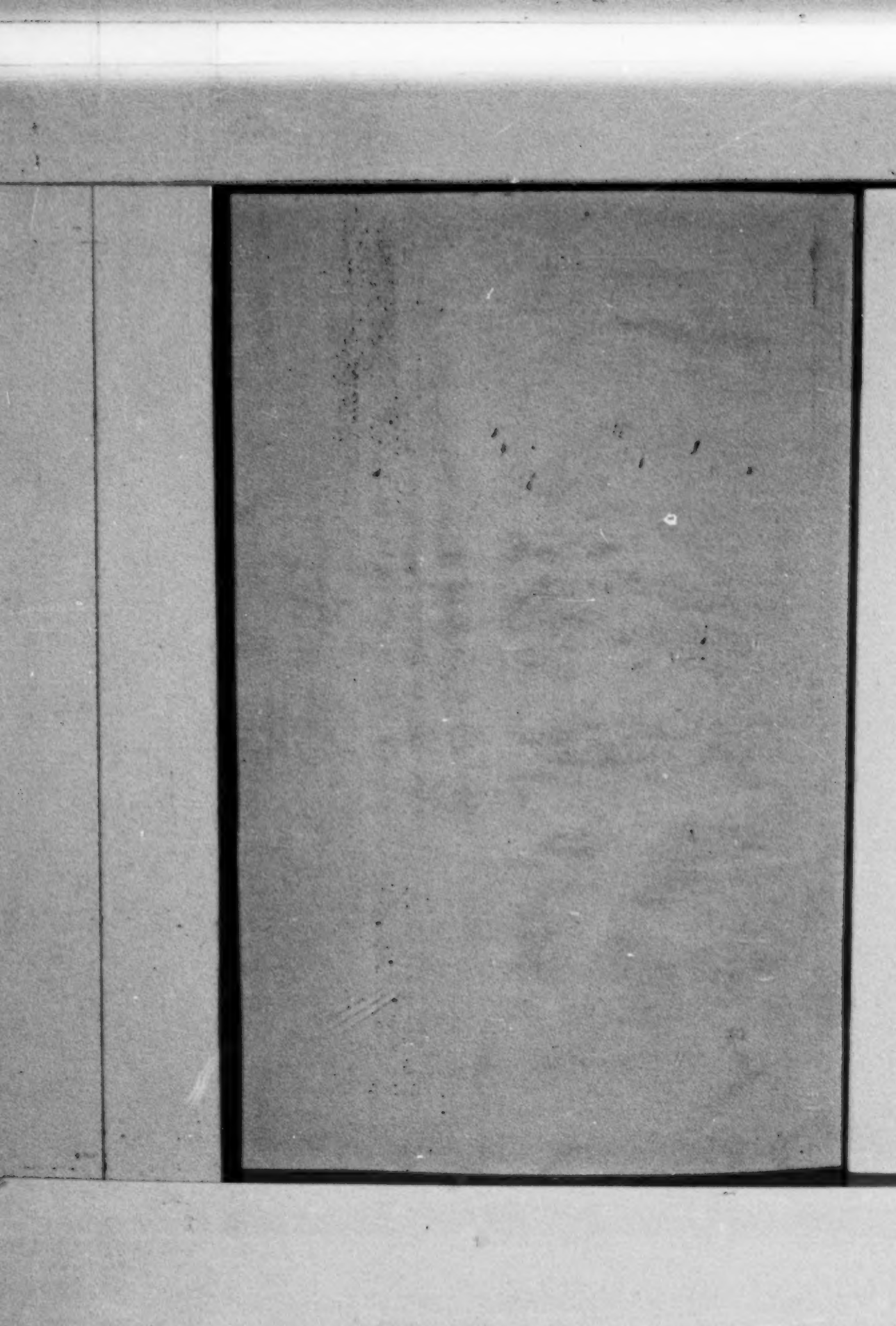
Finally, the interest of the plaintiffs in these cases should be considered. Any deference to administrative primary jurisdiction and subsequent appeals from administrative decisions before a district court adjudication of their complaints will increase costs, delay redress of any wrongs, and act to deter litigation. I also perceive several knotty problems involved in allowing an administrative agency to decide issues which are at the heart of a judicial proceeding. Assuming for the moment that a tort action for interference with one's trade was cognizable at common law, plaintiffs are entitled to a trial of their actions by a jury in the district court. *See, Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916), 5 Moore's Federal Practice ¶38.19 (2d Ed. 1971). I seriously question whether a prior administrative determination of matters at the heart of a lawsuit could subsequently bind a court, for then the administrative proceeding would amount to a deprivation of plaintiff's Seventh Amendment

---

[8] It should be noted also that a court of appeals reviewing any administrative determinations under the Commodities Act can set them aside if they are unsupported by the weight of the evidence. 7 U.S.C. §§ 8, 9, 13a, and 13b. This standard of review has been likened to a *de novo* determination, with proper regard to the credibility determinations of the trier of fact. *Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 479 (7th Cir. 1953). Surely if Congress were interested in promoting uniformity under the Act, it would have provided for a more stringent standard of review.

rights. If the administrative adjudication were not binding, I doubt whether it could be brought to the attention of the jury in the subsequent court proceeding, for it may be inadmissible as infringing upon the province of the jury. Refusal to defer, of course, would avoid these problems.

I find that the trial judge did not abuse his discretion in refusing to defer to the Commission in these cases, given the facts at issue and the particular regulations involved. I concur in the result.



LIBRARY
SUPREME COURT, U. S.

FILED
OCT 3 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-241.

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

v.

DARRYL B. DEAKTOR,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

AARON M. FINE,
JACK JOSEPH,
ARTHUR M. KAPLAN,
Attorneys for Respondent.

Of Counsel:
HAROLD E. KOHN, P. A., Attorneys at Law,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103

JOSEPH & FRIEDMAN,
69 West Washington Street,
Chicago, Illinois. 60602

International Printing Co., 711 So. 8th St., Phila., Pa. 19147 — Tel. (215) 727-0711

INDEX TO BRIEF.

	Page
I. Statement of the Case	1
II. Reasons for Denying the Writ	6
A. There Is No Conflict With This Court's Decision in Ricci v. Chicago Mercantile Exchange	6
B. There Is No Conflict With the Seventh Circuit's Decision in Ricci v. Chicago Mercantile Exchange	9
Conclusion	11

TABLE OF CASES CITED.

	Page
Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 1973 CCH Trade Cases ¶ 74,393 (D. Hawaii 1973)	10
Ricci v. Chicago Mercantile Exchange, 447 F. 2d 713 (7th Cir. 1971)	9
Ricci v. Chicago Mercantile Exchange, 409 U. S. 289 (1973)	3, 6, 7, 8, 9, 10
Seligson v. New York Produce Exchange, et al., 1973 CCH Trade Cases ¶ 74,620 (S. D. N. Y. 1973)	10

STATUTES CITED.

	Page
Commodity Exchange Act:	
7 U. S. C. § 7	1
7 U. S. C. § 7(d)	7, 8
7 U. S. C. § 7a(8)	3, 7, 8
F. R. C. P. 23	1
28 U. S. C. § 1292(b)	3

I. STATEMENT OF THE CASE.

The Deaktor complaint alleges that those defendants who are members of the Chicago Mercantile Exchange (Exchange or CME) manipulated and cornered the market in July, 1970 frozen pork bellies futures contracts traded on the Exchange, forcing up the price of those contracts and injuring traders who, like the plaintiff, sold short and had not liquidated their positions before the defendants' manipulation took effect, so that they were required to cover their positions by purchasing contracts at prices inflated by the defendants' illegal actions.

The complaint also alleges that the Exchange itself, which is a designated contract market under the Commodity Exchange Act (the Act), 7 U. S. C. §7 knew, or should have known, of the unlawful activities of the other defendants and failed to act promptly to stop those activities, and failed thereby to comply with its own Rules and the Act to the injury of the plaintiff and other class members. The plaintiff has sued on his own behalf, and, under F. R. C. P. 23, on behalf of all others similarly situated.

In prior proceedings, hearings were held before the Board of Governors of the Exchange, beginning on September 3, 1970 and concluding on October 6, 1970, on charges brought by the Exchange itself relating to the July, 1970 pork bellies contracts. The transcript covers more than 2800 pages. In those proceedings, Exchange members who are defendants herein were charged with violations of rules of the Exchange. Ultimately, they pleaded guilty or *nolo contendere* to violation of certain rules. Certain of the defendants were adjudged guilty of violations constituting major offenses under the rules of the Exchange and were punished by fine, suspension, or both. Prosecution of the charges before the Exchange was conducted by counsel for the Exchange, who submitted in his opening at the hearings before the Board of Governors that:

". . . we go further and we charge here that there has been a concerted group action which attempted to corner and manipulate the market, that this concerted action was accompanied by and was characterized by violations of these specific Rules to which I have just alluded, that we will establish by documents and oral testimony the substance of our charges that the Board can, in the exercise of its judgment and discretion, and solely on the basis of that evidence prosecuted, pass upon the charges. We think that there has been a sham, a phony or fictitious, very substantial sale or announced sale of a very large quantity of pork bellies in the midst of this scheme and operation. We will demonstrate the extent to which that particular transaction which was widely publicized throughout the country was a sham. This publicizing of a sale constituted the issuance of false information, which is a very grievous offense in our marketplace, as you all know." (39A-40A, CA).[1]

In support of its charges the Exchange called W. M. Phelan, its vice president in charge of Audit and Investigations. He testified that there had been, in his opinion, a manipulation of the July market; that his personal observations had led to that conclusion prior to July, 1970, and as early as May, 1970; and that he had ". . . received constant complaints from the public, phone calls were coming in from all over the country which I received, questioning what we were doing about it." (41A-42A, CA).

In the District Court, certain of the Exchange member defendants, and the Exchange, moved for a stay of proceedings on the ground that the plaintiff should be required

1. References bearing the notation CA are to page numbers in the Appendix filed in the Court of Appeals. All other references are to page numbers in the Appendix to the Petition for Certiorari.

to seek redress in the first instance before the Commodity Exchange Commission. On August 23, 1971, Judge Perry denied the motions in a minute order reciting that they "are not supported in law." On October 14, 1971, on application of the Exchange he amended his order certifying it for interlocutory appeal under 28 U. S. C. § 1292(b). The Court of Appeals for the Seventh Circuit accepted the appeals on January 10, 1972, and on May 21, 1973 rendered its opinion, and concurrence, unanimously affirming the order of the district court. (1a, et seq.)[2] The Court of Appeals considered at length the pertinent decisions of this Court, including *Ricci v. Chicago Mercantile Exchange*, 409 U. S. 289 (1973), and concluded that, "the district court was correct in refusing to stay proceedings" in this case in order to refer matters to the Commodity Exchange Commission. The Court found that:

> 1. In this action, unlike *Ricci*, "the district court is not being asked to reconcile the possibly conflicting policies of two congressional acts". The Complaint in *Deaktor* contains no second antitrust cause of action.
>
> 2. The district court is not being called upon to determine the legality of rules of the Exchange. 7 U. S. C. § 7a(8) requires the Exchange to enforce all Exchange bylaws, rules, and regulations, which have not been disapproved by the Secretary of Agriculture. Exchange Rule 217(C) provides that the Exchange's Business Conduct Committee "be charged with the duty and authority to prevent manipulation" and Exchange Rule 217(D) gives the Business Conduct Committee authority to fulfill that duty through investigation of the financial transactions of members, to

2. Only the Exchange itself and one member defendant appealed. The other member defendants did not appeal.

examine their books, and to issue cease and desist orders, after notice and hearing to members found to be engaging in conduct which is "unfair or unjust".

3. The particular conduct alleged is not arguably protected by other rules of the Exchange, or by provisions of the Commodity Exchange Act.

4. As primary jurisdiction, rather than exclusive jurisdiction, is alleged by appellants (petitioners herein), the courts would have to in the final event hear the questions.

5. The issues of manipulation involved are not different in difficulty or kind from those ordinarily determined by the courts in the first instance in other private damage actions, including securities litigation.

Senior Circuit Judge Castle concurred in the result on the following, related grounds:

1. "Since the Exchange Act does not in any way give a commodities exchange or the Commission power to sanction price manipulation, and since, for reasons to be discussed below, deference to administrative expertise is not vital for defining the scope of the regulations governing the issues raised by the complaints, I do not believe that *Ricci* compels deference to administrative primary jurisdiction in these cases."

2. "Courts have usually invoked the doctrine of primary jurisdiction where they have determined that the issues raised are within the unique expertise of administrative agencies, where the issues involve administrative discretion, and where the desire for uniformity would be frustrated by many courts reaching inconsistent decisions."

3. "Given the unobtrusive nature of the facts at issue in these cases, I doubt whether deference to the

Commission would add substantially to their resolution. These facts do not involve a pervasive regulatory scheme, *United States v. Radio Corporation of America*, 358 U. S. 334, 350 (1950), or matters within administrative discretion, *Great Northern Ry. v. Merchants Elevator Co.*, 259 U. S. 285, 294 (1922), but rather a unique set of facts concerning situations which may never be repeated."

4. "The main issue common to all these appeals —i.e., whether a manipulation of prices occurred—is one which the judiciary has considered itself just as competent as the Commodities Exchange Commission to pass upon. Since the term manipulation is undefined in the Act, courts of appeal have given it meaning in the cases taken on direct appeal from Commission determinations. *Volkart Brothers Inc. v. Freeman*, 311 F. 2d 52, 58 (5th Cir. 1962); *General Foods Corp. v. Brannan*, 170 F. 2d 220, 223-24 (7th Cir. 1948)."

5. "Finally, the interest of the plaintiffs in these cases should be considered. Any deference to administrative primary jurisdiction and subsequent appeals from administrative decisions before a district court adjudication of their complaints will increase costs, delay redress of any wrongs, and act to deter litigation."

Appellants, including the Petitioner herein, petitioned for a rehearing, including suggestion of a rehearing *en banc*. On June 26, 1972 the petition was denied, "no judge in active service having requested a vote thereon, nor any judge [having] voted to grant the suggestion." (20a) Only the Exchange has petitioned this Court for a writ of certiorari.

II. REASONS FOR DENYING THE WRIT.

A. There Is No Conflict With This Court's Decision in Ricci v. Chicago Mercantile Exchange.

Petitioner misconceives the scope of this Court's holding in *Ricci v. Chicago Mercantile Exchange*, 409 U. S. 289 (1973) urging, in effect, that every case in which the Chicago Mercantile Exchange (or any other commodities exchange) is a party, must by reason of that fact alone be referred to the Commodity Exchange Commission in the first instance. Petitioner's argument both misconstrues *Ricci*, and misperceives the role of the Exchange in this litigation. For the Exchange is, primarily, charged with a violation of its own rules, which it is under a clear duty to enforce. In that respect it stands on equal footing with other parties charged with Exchange rule violations.

The Court of Appeals found, and it is not disputed, that:

> ". . . the Chicago Mercantile Exchange Rule 217(C) provided that the Business Conduct Committee be charged with the duty and authority to prevent manipulation of prices and the cornering of any commodity. Rule 217(D) gives the Business Conduct Committee authority to investigate the transactions and financial condition of members, to examine their books, to prescribe capital requirements, and to issue cease and desist orders, after notice and hearing, to members found to be engaging in conduct which is 'unfair or unjust'." (3a-4a)

It is also without dispute, as found by the Court of Appeals, that: "In order to qualify as a contract market, the Chicago Mercantile Exchange was required to file with the

Secretary its rules, regulations and by-laws, including rules 'for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board'." 7 U. S. C. §7(d). (3a) The Exchange is required by 7 U. S. C. §7a(8) in addition, to "enforce all by-laws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market, or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture. . . ." (3a)

Ricci, by questioning whether loss of Exchange membership violated Exchange rules or was permitted or protected by them, raised complicated and substantial questions concerning the scope and purpose of the rules. (6a) The Court of Appeals rightly found no such issue herein. (3a, 6a-8a and concurrence at 15a-17a). The Exchange, quite simply, was required to enact rules to prevent manipulation, did enact such rules, and was under a statutory duty to enforce its rules. No complicated problem of reconciling potentially conflicting statutory policies of the Commodities Exchange Act and the antitrust laws is here involved, as it was in *Ricci*. Nor is the legality of any Exchange rule here questioned, as it was in *Ricci*. As stated in Judge Castle's concurrence herein:

> "Given the unobstrusive nature of the facts at issue in these cases, I doubt whether deference to the Commission would add substantially to their resolution. These facts do not involve a pervasive regulatory scheme, *United States v. Radio Corporation of America*, 358 U. S. 332, 350 (1959), or matters within administrative discretion, *Great Northern Ry. v. Merchants Elevator Co.*, 259 U. S. 285, 294 (1922), but

rather a unique set of facts concerning situations which may never be repeated. The main issue common to all these appeals—i.e., whether a manipulation of prices occurred—is one which the judiciary has considered itself just as competent as the Commodity Exchange Commission to pass upon. Since the term manipulation is undefined in the Act, courts of appeal have given it meaning in the cases taken on direct appeal from commission determinations. *Volkart Brothers, Inc. v. Freeman*, 311 F. 2d 52, 58 (5th Cir. 1962), *General Foods Corp. v. Brannan*, 170 F. 2d 220, 223-24 (7th Cir. 1948) . . . In short, it is doubtful that deference can add much to the work of a court and jury in resolving the issues concerning manipulation in the instant cases, . . . " (17a, 18a)

The problem in *Ricci*, as this Court stated, "arises when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." 409 U. S. at 299-300. There is no antitrust claim in the *Deaktor* action. The only claims alleged arise under the Commodities Exchange Act, and as the Court of Appeals found, the Act clearly and forthrightly requires the Exchange to enact rules and to enforce its rules, "for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board." 7 U. S. C. §7(d) and 7 U. S. C. §7a(8). The violations of the Act and rules thereunder are not arguably protected by "another regulatory statute enacted by Congress," as in *Ricci*.

Indeed, the Petition for Certiorari concedes in regard to the *Phillips* case,[3] in which certiorari is also sought, that §7(a)8 of the Commodities Exchange Act "requires CME

3. Unlike *Deaktor*, *Phillips* does involve antitrust claims.

to adopt rules and exercise self-regulatory powers to prevent manipulation." (Petition at 6)

Only where referral to an administrative proceeding is "likely to make meaningful contribution" to the resolution of a lawsuit is the application of primary jurisdiction in order. *Ricci, supra*, 409 U. S. at 306-307.

No "meaningful contribution" is likely where the Exchange is charged with a violation of its rules for the prevention of manipulation, which it is under a clear duty to enforce, and where no countervailing Exchange rule or statutory provision can be seriously claimed to immunize the violation of the rules.[4] After measuring the allegations (and the evidence in the prior CME proceedings) against the principles of law involved, the district court and a unanimous panel of the Court of Appeals concluded that administrative referral and a stay of court proceedings were not likely to produce the requisite "meaningful contribution"; and not a single judge of the Seventh Circuit felt that reconsideration was required by the facts of this case.

B. There Is No Conflict With the Seventh Circuit's Decision in Ricci v. Chicago Mercantile Exchange.

Curiously, the Petition alleges that the decision of the Court of Appeals for the Seventh Circuit herein conflicts with the decision rendered by the same Circuit in *Ricci v. Chicago Mercantile Exchange*, 447 F. 2d 713 (7th Cir.

4. Compare Judge Castle's unassailable finding regarding immunization of manipulation:

> ". . . [T]he Exchange Act does not in any way give a commodities exchange or the Commission power to sanction price manipulation . . ." (15a)

to the situation in *Ricci*:

> "The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer, and loss of membership." 409 U. S. at 303.

1971), prior to review by this Court. The petition cites the Court of Appeals' conclusion that the questions in *Ricci* "are precisely the ones that the Commission and the Secretary are to resolve." There is no reason to believe that the Court of Appeals for the Seventh Circuit gave less consideration to the nature of the questions involved herein, than it did in *Ricci*. It is the questions involved which differ entirely, rather than the quality of review.

This makeshift "conflict" is belied by the order of the Seventh Circuit denying rehearing. Not a single judge favored a rehearing *en banc*. Furthermore, the Seventh Circuit's construction of *Ricci* herein, comports with the reasonable construction of that decision in districts outside the Seventh Circuit. In *Seligson v. New York Produce Exchange, et al.*, 1973 CCH Trade Cases ¶ 74,620 (S. D. N. Y. 1973), the district court noted that:

> "In discussing the first of its three premises for referral to the Commodity Exchange Commission, the Supreme Court noted that if the challenged membership transfer was made in accordance with a valid Exchange rule:
>
> > 'the immediate question for the antitrust court is whether the rule itself and Ricci's exclusion under it are insulated from antitrust attack.' (93 S. Ct. at 581).
>
> It is evident, therefore, that the Court based its application of the doctrine of primary jurisdiction on the possibility that conduct alleged as violative of the antitrust laws was authorized by the Commodity Exchange Act and immune, by virtue of that authorization, from antitrust attack. As a consequence, it would appear that where a complaint alleges conduct . . . which is clearly violative of the [Commodity Exchange] Act and outside the scope of any authority

> granted to the defendant exchange members, referral to the Commission would not be, in the language of the Court's third premise, 'of material aid . . .'."

See also *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 1973 CCH Trade Cases ¶ 74,393 (D. Hawaii 1973).

CONCLUSION.

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

AARON M. FINE,
JACK JOSEPH,
ARTHUR M. KAPLAN,
Attorneys for Respondent.

Of Counsel:
HAROLD E. KOHN, P. A.,
Attorneys At Law,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103

JOSEPH & FRIEDMAN,
69 West Washington Street,
Chicago, Illonis. 60602



LIBRARY
SUPREME COURT, U. S.

FILED
OCT 27 1973
MICHAEL RODAK, JR., CLERK

No. 73-241

In the
Supreme Court of the United States
OCTOBER TERM, 1973

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

DARRYL B. DEAKTOR,
Respondent,

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

AL PHILLIPS, JR., et al.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEE A. FREEMAN
LEE A. FREEMAN, JR.
JEROLD E. SALZMAN
Attorneys for The Chicago Mercantile Exchange

FREEMAN, FREEMAN & SALZMAN
One IBM Plaza—Suite 3200
Chicago, Illinois 60611
Telephone: (312) 467-6540

© The Schaffer Press, Inc.—(312) 263-6250

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-241

CHICAGO MERCANTILE EXCHANGE,

Petitioner,

vs.

DARRYL B. DEAKTOR,

Respondent,

and

CHICAGO MERCANTILE EXCHANGE,

Petitioner,

vs.

AL PHILLIPS, JR., et al.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The brief filed by the *Phillips* respondents underscores the need for administrative consideration of this case before it is entertained by the federal court.

The complaint in *Phillips* is bottomed upon the allegation that the Chicago Mercantile Exchange ("CME")

violated the provisions of the Commodity Exchange Act and CME's own rules by the procedures that CME's Business Conduct Committee implemented to prevent a manipulation of the March 1970 fresh eggs futures contract. Although respondents have labored to portray this case as involving "conspiracy" and "denial of due process," the fact remains that this lawsuit concerns solely the performance of CME's statutory duty of self-regulation.

The events giving rise to the complaint may be briefly described. On March 17, 1970, the Business Conduct Committee was alerted to facts that suggested a possible manipulation of the March 1970 fresh egg futures contract. At that point in time 2,455 contracts were unliquidated and only two trading days remained (Complaint ¶38). The Business Conduct Committee met on the evening of March 17 and, after investigation, ordered clearing members who controlled unusual concentrations of long or shot positions to liquidate half of their positions.

Respondents charges that the Business Conduct Committee made this ruling without the requisite notice and opportunity to be heard as provided in CME's Rule 217(D) and that its ruling was not properly promulgated. On the contrary, CME contends that its decision was correct and that its procedures accorded with CME's rules relating to "emergency" situations, *i.e.*, Rules 908, 1229 and 1230.

The ultimate question is whether CME's actions were appropriate to meet the critical situation that arose on March 17, 1970.* This is the type of dispute that should be resolved by the administrative agency having ultimate authority over the CME's duty of self-regulation and re-

sponsibility for enforcement of the Commodity Exchange Act.

For the reasons set forth in the Petition, this Court should grant certiorari and reverse the decision of the Court of Appeals for the Seventh Circuit.

Dated October 25, 1973

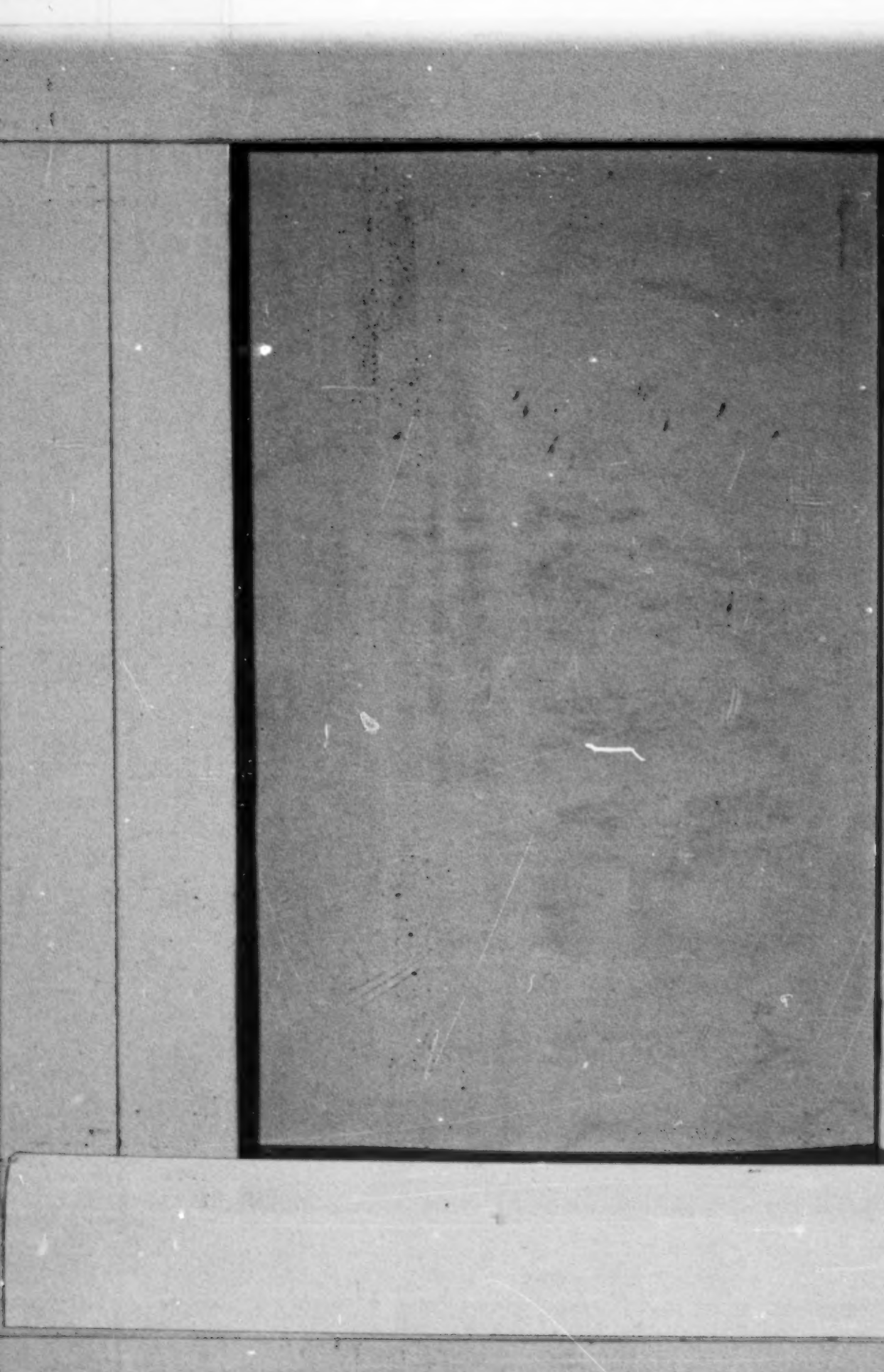
Respectfully submitted,

LEE A. FREEMAN
LEE A. FREEMAN, JR.
JEROLD E. SALZMAN
Attorneys for The Chicago Mercantile Exchange

FREEMAN, FREEMAN & SALZMAN
One IBM Plaza
Suite 3200
Chicago, Illinois 60611
(312)-467-6540

---

* It is frivolous to claim that respondents and the hundreds of other persons holding the 2,455 open contracts as of March 17, 1970 had to be notified and afforded a hearing prior to legitimate action by the CME. Neither the Commodity Exchange Act or the CME's rules require such notice and hearing. The practical reasons are obvious: (1) There is simply no time to conduct public hearings in an emergency situation created by an apparent manipulation of the market two days before the close of the contract; (2) The persons with open contracts change so rapidly that it would be impossible to inform everyone; and (3) The announcement of such meeting itself would likely have a deleterious market affect.



73-241

LIBRARY
SUPREME COURT, U.S.

FILED
OCT 11 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

DARRYL B. DEAKTOR,
Respondent,

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

AL PHILLIPS, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENTS AL PHILLIPS, JR., ET AL. IN OPPOSITION TO THE CHICAGO MERCANTILE EXCHANGE'S PETITION FOR A WRIT OF CERTIORARI.

JAMES E. S. BAKER
One First National Plaza
Chicago, Illinois
(312) 329-5410
Attorney for Respondents, Al Phillips, Jr., et al.

Of Counsel:
BRUCE P. BICKNER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois
(312) 329-5400

Dated: October 10, 1973

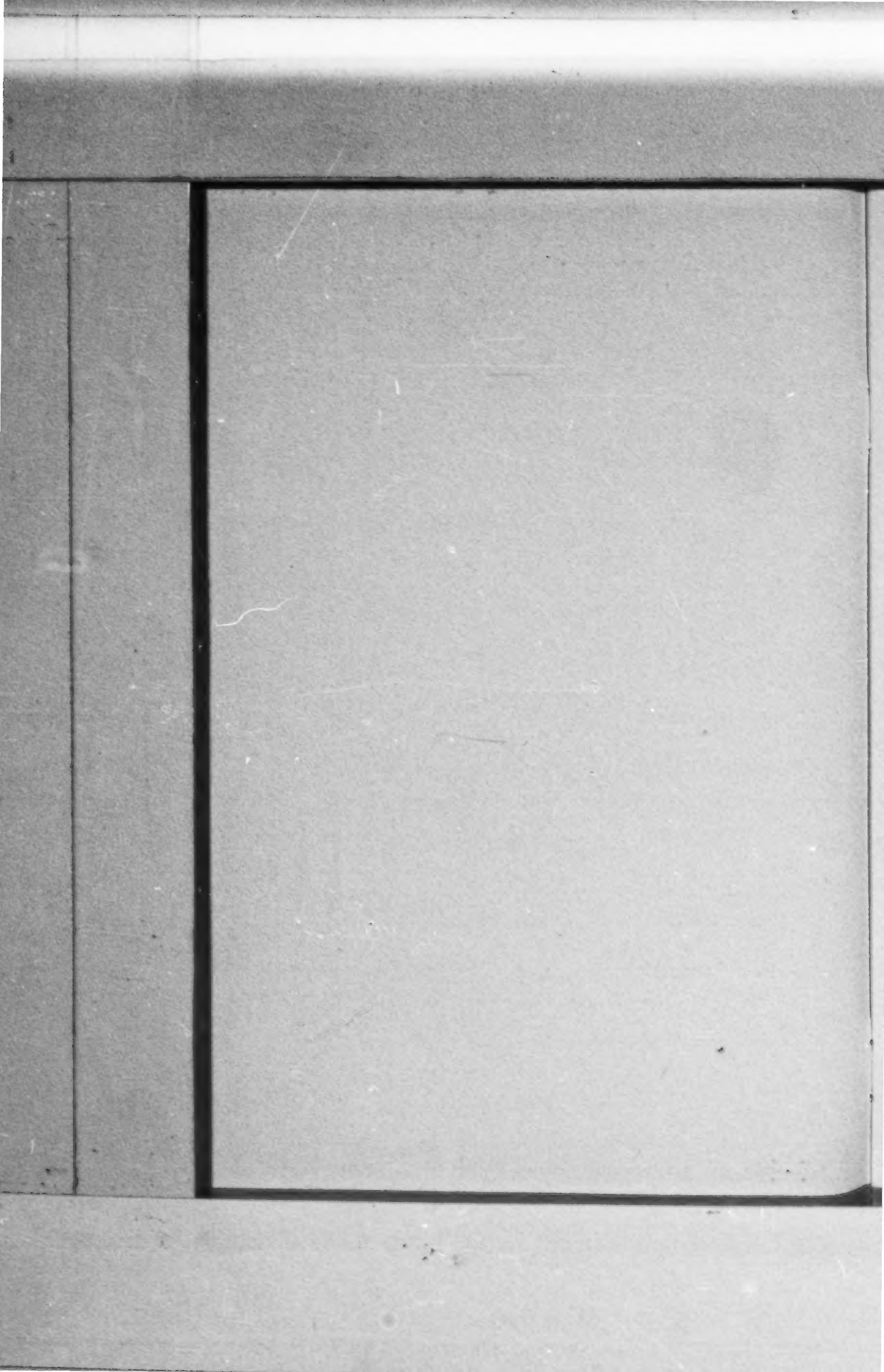


TABLE OF CONTENTS.

PAGE

Issue Presented 1

Counter Statement of Case 2

Reasons for Denying Petition 6

I. The CME's Total Disregard for Due Process Precludes Any Justification of Its Conduct 6

II. Respondents' Allegations Pose No Potential Conflict Between the Commodity Exchange Act and the Antitrust Laws; *Ricci* Does Not, Therefore, Require the Exercise of Primary Jurisdiction by the Commodity Exchange Commission 7

A. CME's Conduct Is Not Arguably Protected from Antitrust Attack by the Commodity Exchange Act 8

B. This Proceeding Involves No Potential Conflict Between the Commodity Exchange Act and the Antitrust Laws 10

III. Proceedings Before the Commodity Exchange Commission Would Not Be of Material Aid in Resolving Any Issue of Immunity 10

IV. The Expertise of the Commodity Exchange Commission Is Not Required 11

V. The Commodity Exchange Commission Cannot Grant the Remedy Sought 12

VI. Discovery in the District Court Is Almost Completed and Resort to the Commodity Exchange Commission Would Only Retard, Not Advance, the Overall Determination of This Matter 13

Conclusion 14

Supplemental Appendix ..... A. 1

TABLE OF AUTHORITIES.

Allied Air Freight, Inc. v. Pan American World Airways, Inc., 363 F.2d 441 (2nd Cir. 1968), *cert. denied*, 393 U.S. 846 12

Baird v. Franklin, 141 F.2d 238, 245 (2d Cir. 1944), *cert. denied*, 323 U.S. 737 (1945) 12

Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918) 6

Great Western Food Distributors, Inc. v. Brannan, 201 F.2d 476 (7th Cir. 1953) 12

Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) 5, 7, 8, 9, 10

Seligson v. New York Produce Exchange, BNA Antitrust Trade Reg. Rep. No. 358, p. A-6 (S.D.N.Y. Oct. 27, 1971) 13

Seligson v. New York Produce Exchange, 1973-2 CCH Trade Cas. ¶ 74,620 (S.D.N.Y. July 19, 1973) 11

Silver v. New York Stock Exchange, 373 U.S. 341, 357, 361 (1963) 6, 7, 12

Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264, 273, 275 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) 12

Trans World Airlines v. Hughes, 214 F.Supp. 106, 111-112 (S.D.N.Y. 1963), aff'd, 332 F.2d 602 (2nd Cir. 1964) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-214

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

DARRYL B. DEAKTOR,
Respondent,

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

AL PHILLIPS, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENTS AL PHILLIPS, JR., ET AL. IN OPPOSITION TO THE CHICAGO MERCANTILE EXCHANGE'S PETITION FOR A WRIT OF CERTIORARI.

ISSUE PRESENTED.

Whether the Court of Appeals, having found that the Chicago Mercantile Exchange's conduct is in no sense arguably protected by the Commodity Exchange Act, properly affirmed the District Court's refusal to stay proceedings pending exercise of jurisdiction by the Commodity Exchange Commission.

COUNTER STATEMENT OF CASE.

Respondents are twenty-four (24) traders who, at the close of trading on March 17, 1970, held futures contracts to purchase March 1970 fresh eggs on the Petitioner, Chicago Mercantile Exchange (hereinafter "CME"). On May 21, 1970, they commenced these proceedings to recover monetary damages for themselves individually and as representative parties on behalf of all other traders similarly situated.

Respondents allege that the CME, certain of its officers, its Business Conduct Committee, and other traders who, at the close of trading on March 17, 1970, held futures contracts to sell March 1970 fresh eggs on the CME, combined, agreed and conspired to unreasonably restrain and to monopolize the trading in and of March 1970 fresh eggs on the CME in violation of §§ 1 and 2 of the Sherman Act.[1] (Complaint ¶ 45.) This combination, agreement and conspiracy was furthered and effected by a March 17, 1970, ruling of the Business Conduct Committee of the CME. This ruling required certain broker-clearing members who held, or represented others who held contracts to purchase March, 1970 fresh egg futures to (1) liquidate fifty percent of their house and customer contracts to purchase March, 1970 fresh egg futures by the close of business, March 18, 1970; and (2) deposit with the Department of Audits and Investigations of the CME by 10:00 A. M. on March 19, 1970, a certified check for the full value of any remaining contract to purchase March, 1970 fresh egg futures on which the holder thereof desired to take delivery. (Complaint, ¶ 47; Exhibit "A".)

1. The CME contends that the Court of Appeals failed "to distinguish between the allegations of manipulation lodged against certain traders and the complaint made against CME of failing to enforce its rules." (CME Petition p. 8.) CME thereby seeks to confuse the respondents' claim in this respect, i.e., that the CME's failure to provide respondents with notice or an opportunity to be heard and to comply with Rule 217(D) were acts in furtherance of a combination, agreement and conspiracy between the CME and others to manipulate the market.

This ruling was made by the CME without according even a semblance of due process to respondents and the others affected thereby. CME Rules fail to provide *customer-traders* with any notice of or opportunity to be heard in connection with Business Conduct Committee rulings. Rule 217(D) of the *Rules of the Chicago Mercantile Exchange*, on the other hand, provides that *broker-clearing members* affected by Committee action shall receive such notice and a right to be heard. (Supp. App. 1.)[2] In this instance, however, the Committee totally disregarded the Rules. Neither the broker-clearing members affected by the March 17, 1970, order of the Business Conduct Committee, or their customers, were ever advised of any investigation by or afforded an opportunity to appear before the Business Conduct Committee to offer testimony, explanation or justification as provided for in said Rule. (Complaint ¶ 47G; Harris 20; Phelan 45-47, 52-54; O'Brien 21-22; Goldstant 26-28; Brodskey 13, 24; Melamed 35.)[3] Furthermore, the March 17, 1970, ruling of the Business Conduct Committee was never made public; only those broker-clearing members directly affected were advised of the Committee's ruling after it already had been made. The ruling was never communicated to respondents or members of the class, even though its effect was to close out their contracts involuntarily.

Respondents further allege that the failure of the CME to afford those affected by the March 17, 1970, ruling of the Business Conduct Committee the requisite notice and opportunity to be heard provided for in Rule 217(D) constitutes a violation of the CME's duties under §§ 5a(8) and 9(b) of the Commodity Exchange Act. (Complaint ¶¶ 51, 55 and 56.)

Section 5a(8) requires the CME, as a contract market to:

> "enforce all . . . rules . . . made or issued by it . . . which relate to terms and conditions in contracts of sale to be

2. "Supp. App." refers to the Supplemental Appendix attached hereto.

3. References herein to deposition testimony are by the deponent's last name and page citation.

executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture . . ."

As a result of the CME's failure to enforce Rule 217(D) as required by § 5a(8), respondents and others similarly situated were forced to comply with the March 17, 1970, ruling of the Business Conduct Committee of the CME without benefit of any hearing or notice or other procedural and substantive safeguards against the inequitable treatment of those trading on the CME which are part of the rules and regulations of CME as approved by the United States Secretary of Agriculture. (Complaint ¶ 54.)

This conduct also violated § 9(b) of the Commodity Exchange Act in that (1) it constituted an attempt to and a manipulation of the price of a commodity for future delivery on a contract market; and (2) the CME's notification of some, but not all, of those trading in March, 1970 fresh egg futures on the CME of the March 17, 1970, ruling of the Business Conduct Committee of the CME constituted knowledgeable delivery for transmission in interstate commerce by the mails and telephone of misleading (by omission) information concerning conditions that affect or tend to affect the price of a commodity in interstate commerce. (Complaint ¶¶ 55, 56.) This combination, agreement, conspiracy and failure to enforce CME Rules was calculated to and did reverse the rising market price for March, 1970 fresh egg futures on the CME. As a result, respondents and others similarly situated were forced to liquidate their contract positions at artificially depressed prices, thus receiving less than they would have received in a free market. (Complaint ¶¶ 39, 48.)

Extensive discovery has been taken by both sides. Depositions of eleven (11) of the respondents have been taken; production has been made of substantially all of the documents concerning respondents' trading in March, 1970 fresh egg futures; and each respondent has answered the CME's comprehensive interroga-

tories. Depositions of the CME and seven (7) of its officers and Committee members have also been taken. Production of substantially all of the documents of the CME concerning the Business Conduct Committee's ruling of March 17, 1970, has been made. Respondents subpoenaed and received substantially all of the customer trading records of fifteen (15) brokerage houses which held the largest house and/or customer positions in the March, 1970 fresh egg contract.

Subsequent to the completion of such discovery, the CME, on August 17, 1971 [some fifteen (15) months after filing of the Complaint], first moved to stay the present proceedings pending exercise of jurisdiction by the Commodity Exchange Commission. (No proceeding is or ever has been pending before the Commission.) On September 17, 1971, the District Court denied the CME's motion. On October 5, 1971, the CME petitioned the District Court to reconsider its Order of September 17, 1971. By Order dated October 14, 1971, the District Court denied the CME's petition for reconsideration but certified the issue raised therein in accordance with the provisions of 28 U.S.C. § 1292(b).

On October 20, 1971, the CME filed a petition with the Court of Appeals for the Seventh Circuit for leave to appeal from the District Court's interlocutory order. The petition was granted on November 3, 1971. Briefs were filed but oral argument was not held until after this Court's decision in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). Following such decision, oral argument was scheduled and on May 21, 1973, the Court of Appeals affirmed the orders of the District Court denying a stay of proceedings pending exercise of jurisdiction by the Commodity Exchange Commission. The CME's petition for rehearing *en banc* was denied on June 26, 1973, and a subsequent motion to recall and stay the mandate was denied on July 11, 1973. On August 4, 1973, the CME petitioned this Court to issue a writ of certiorari.

REASONS FOR DENYING THE PETITION.

I.

THE CME'S TOTAL DISREGARD FOR DUE PROCESS PRECLUDES ANY JUSTIFICATION OF ITS CONDUCT.

Commodity exchanges such as the CME are, by their very nature, combinations in restraint of trade. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231 (1918). Thus, were it not for the enabling legislation contained in the Commodity Exchange Act (hereinafter "Act"), the CME would constitute a group boycott violative of the Sherman Act. The Act does not, however, immunize all—or even most—exchange conduct. As stated in *Silver*, repeal of the antitrust laws is to be inferred from a regulatory scheme "only if necessary to make the [Act] work, and even then only to the minimum extent necessary." (373 U. S. at 357.)

In *Silver*, plaintiffs, non-members of the Exchange seeking an injunction and treble damages, alleged that the Exchange had, in violation of §§ 1 and 2 of the Sherman Act, conspired with its member firms to deprive plaintiffs of their private wire connections with Exchange members. The action of the Exchange in ordering certain of its members to remove the wire connection previously in operation between their offices and those of the non-members had been taken pursuant to rules which the Exchange had adopted under the Securities Exchange Act of 1934, but the action was taken without notice to petitioners or an opportunity for them to be heard.

The Court in *Silver* held that the Exchange's failure to notify the non-members affected by its action of the underlying charges and to afford them an opportunity to explain or refute the

charges against them constituted such an obvious and complete denial of due process as to *preclude any justification* for antitrust immunity. *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 361 (1963).

Silver demonstrates that a self-regulatory exchange cannot avoid antitrust liability where its rules fail to afford non-members the guarantees of fundamental due process. In this regard the CME Rules totally fail to provide non-member customers (such as respondents) with any notice whatsoever of investigations undertaken or actions contemplated by the Business Conduct Committee. Customers are thus denied any opportunity to answer or explain charges which may have been made against them and which charges may form the basis for Committee rulings. Rules which fail to provide such basic due process do not even reach the threshold of justification required for a claim to antitrust immunity. (373 U. S. at 341.) Furthermore, nothing in the terms or policy of the Act requires or even contemplates that the CME be permitted to deprive traders of contract profits without notice and opportunity for a hearing. Therefore, just as in *Silver*, neither the Act nor the CME Rules pose any barrier to this antitrust action.

II.

RESPONDENTS' ALLEGATIONS POSE NO POTENTIAL CONFLICT BETWEEN THE COMMODITY EXCHANGE ACT AND THE ANTITRUST LAWS; RICCI DOES NOT, THEREFORE, REQUIRE THE EXERCISE OF PRIMARY JURISDICTION BY THE COMMODITY EXCHANGE COMMISSION.

The CME contends, however, that its conduct is justified by the Act, and further, that the ruling in *Ricci*, *supra*, precludes the courts from denying its request for a stay of proceedings and requires respondents to request the initiation of proceedings before the Commodity Exchange Commission (hereinafter "Commission") as a prerequisite to continuing with their present action.

To the contrary, in *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973), this Court set forth the circumstances under which the doctrine of primary jurisdiction requires that alleged violations of both the antitrust laws and the Act must be heard in the first instance by the Commission rather than the federal district courts. The Court held that primary reference to the Commission is required *only where* (1) "it will be essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of the antitrust action';" (2) "some facets of the dispute between [the parties is] within the jurisdiction of the Commodity Exchange Commission" and (3) "adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question."[4] (409 U. S. at 302.) For the reasons set out below, respondents believe that the Court of Appeals correctly concluded that the foregoing factors requiring exercise of primary jurisdiction by the Commission are not present in this action and, accordingly, that the District Court properly refused to stay its proceedings pending Commission action.

A. CME's Conduct Is Not Arguably Protected from Antitrust Attack by the Commodity Exchange Act.

As stated by this Court in *Ricci*, the issue of primary jurisdiction arises only "when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." (409 U. S. at 299-300.) *Ricci* involved an allegation that the CME transferred Ricci's membership in violation of CME rules and the Act. The CME contended, on the other hand, that its actions were in accordance with its rules and the Act, and further, that its conduct was immune from antitrust attack because it was in furtherance of the Act's regulatory scheme.

4. The Court did not hold, as contended by the CME at pp. 9-10 of its Petition, that all actions against commodity futures markets, such as the CME, must be stayed pending exercise of primary jurisdiction by the Commission.

The Court noted that the Act contemplates a membership organization with standards for the acquisition, retention and loss of membership and, further, that an "Exchange and its members 'will engage in restraints of trade which might well be unreasonable absent sanction' by the Act." The Court then concluded that if Ricci lost his CME membership pursuant to a valid CME rule, it would be necessary for the federal courts to determine whether the CME's conduct was immune from antitrust attack because it was pursuant to a rule which was a necessary and integral part of the exchange self-regulation contemplated by the Act. The Court also stated, however, that if Ricci's loss of membership was contrary to CME rules "the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent . . . that the jurisdictional and remedial powers of the Commodity Exchange Commission are exclusive." (409 U. S. at 304.)

The Court's decision in *Ricci* is clearly premised on its conclusion that there was "substance" to the CME's claim to antitrust immunity. In the present proceeding, by contrast, there is no basis whatsoever for concluding that the CME's conduct is arguably protected. The Business Conduct Committee's ruling of March 17, 1970, clearly violated the requirements of due process as well as CME Rule 217(D). The Rules, as stated *supra*, do not provide non-member customers—the real parties in interest—with notice of Committee investigations or an opportunity to be heard. Rule 217(D) does provide for such notice to clearing members, but nonetheless the Committee, by its own admission, failed even to give affected clearing members any notice or opportunity to be heard prior to making its March 17, 1970, ruling. (O'Brien 21-22, 24-25; Goldstant 26-28; Brodskey 13, 24; Phelan 45-47, 52-54.)

Such acknowledged failure to enforce its own rules is likewise a conclusive violation of § 5(a)8 of the Act. And where, as respondents allege, such ruling was in furtherance of and with the purpose of effectuating a combination, agreement and con-

spiracy to restrain trade by manipulating the market for a commodity, there is no doubt but that the CME's conduct violates § 1 of the Sherman Act and § 9(b) of the Act. Thus, unlike *Ricci*, there is no substance to the CME's claim to antitrust immunity—a conclusion unanimously reached by the Court of Appeals below. (App. 10a-11a.)

B. This Proceeding Involves No Potential Conflict Between the Commodity Exchange Act and the Antitrust Laws.

Respondents do not allege that Rule 217(D) violates either the Act or the antitrust laws. To the contrary, respondents contend that it was the CME's failure (a) to provide customers with notice and an opportunity to be heard and (b) to comply with its own Rule 217(D) by giving the required notice and opportunity to be heard which constitutes a violation by the CME of both the Act and the antitrust laws. The present proceeding is thus unlike *Ricci* in two important respects: (1) there is no basis for the CME's present claim to antitrust immunity and (2) there is no potential for conflict between the two regulatory schemes. And, as this Court held in *Ricci*, where the alleged exchange conduct is not arguably protected, and there is no other basis for potential conflict between the Act and the antitrust laws, there is no reason to defer to the Commission and the antitrust action should "take its normal course." (409 U. S. at 304.)

III.

PROCEEDINGS BEFORE THE COMMODITY EXCHANGE COMMISSION WOULD NOT BE OF MATERIAL AID IN RESOLVING ANY ISSUE OF IMMUNITY FROM THE ANTITRUST LAWS.

The third premise for this Court's decision in *Ricci*, was the Court's belief that hearings before the Commission would materially aid in resolving the antitrust immunity question presented by that case. As just noted, however, the CME's conduct presently challenged is in no sense arguably protected, and

there is no potential conflict between the Act and the antitrust laws in this proceeding. There is, therefore, no immunity question for the Commission to aid in resolving.

A similar situation was presented in *Seligson* v. *New York Produce Exchange*, 1973-2 CCH Trade Cas. ¶ 74,620 (S. D. N. Y. July 19, 1973), where the court was asked, on the basis of this Court's decision in *Ricci*, to reconsider a previous refusal to stay proceedings pending exercise of jurisdiction by the Commission. In construing *Ricci*, the court stated,

> "It is evident, therefore, that the Court based its application of the doctrine of primary jurisdiction on the possibility that conduct alleged as violative of the antitrust laws was authorized by the Commodity Exchange Act and immune, by virtue of that authorization, from antitrust attack. As a consequence it would appear that where a complaint alleges conduct under color of Commodity Exchange Act authority which is clearly violative of the Act and outside the scope of any authority granted to the defendant exchange members, referral to the Commission would not be, in the language of the Court's third premise, 'of material aid in resolving [any] immunity question'."

As in *Seligson*, referral to the Commission in this case would not aid in resolving any immunity question; there is no such question here for the court to resolve.

IV.

THE EXPERTISE OF THE COMMODITY EXCHANGE COMMISSION IS NOT REQUIRED.

This case involves the determination of a single issue: whether defendants conspired to manipulate the March 1970 futures market in fresh eggs by *inter alia*, issuing a ruling through the Business Conduct Committee without affording respondents, and other members of the class, either notice or an opportunity to be heard. Such an issue does not involve any basic administrative policy determination or exercise of discretion. Market manipu-

lation is expressly prohibited by the Act. *Great Western Food Distributors, Inc.* v. *Brannan*, 201 F.2d 476 (7th Cir. 1953).

It is also important to note what this case does not involve. The correctness of the CME's determination that the March, 1970 fresh egg contract was not liquidating properly is not at issue. Respondents challenge the CME's failure to afford them, and other members of the class, with the fundamentals of due process. As noted in *Silver*, such lack of due process in and of itself constitutes a violation of the antitrust laws without regard to the substantive correctness of the CME's ruling.

Moreover, the facts relating to this issue of conspiracy can easily be determined by a federal court, which is "the repository of antitrust expertise." (*Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994.) Lay juries, under proper instruction from the Court, could determine all factual issues involved.

V.

THE COMMODITY EXCHANGE COMMISSION CANNOT GRANT THE REMEDY SOUGHT.

Respondents seek nothing but monetary damages for the injury caused them by the completed action of the CME and others. The Commission and Secretary, however, are without power to award damages. The enforcement powers of the Commission and the Secretary, as expressed in the Act, are limited to (1) cease and desist orders, and (2) suspension or revocation of designation as a contract market or license. None of these enforcement powers could remedy the damage done to plaintiffs by the completed action of defendants. Reference to such an impotent body serves only to frustrate or delay plaintiffs' right to their day in court. See *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441, 448 (2d Cir. 1968), *cert. denied*, 393 U.S. 846; *Baird* v. *Franklin*, 141 F.2d 238, 244-46 (2d Cir. 1944), *cert. denied*, 323 U.S. 737 (1945); *Trans World Airlines, Inc.* v. *Hughes*, 214 F.Supp. 106,

111-12 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 602 (2d Cir. 1964). To require respondents to seek action by the Commission is to require a futile act.

VI.

DISCOVERY IN THE DISTRICT COURT IS ALMOST COMPLETED AND RESORT TO THE COMMODITY EXCHANGE COMMISSION WOULD ONLY RETARD, NOT ADVANCE, THE OVERALL DETERMINATION OF THIS MATTER.

The CME chose not to request a stay of proceedings until after extensive discovery had been taken. Only after fifteen (15) months, twenty (20) depositions and lengthy document production and examination did the CME raise the issue of primary jurisdiction.

The United States District Court for the Southern District of New York, under similar circumstances, denied a stay, noting that:

> "This action was initiated on April 11, 1966. Its already long procedural history reveals massive discovery and extensive pretrial activity over a period of more than five years. To date, this action has proliferated to such an extent as to require entries filling five and one half sheets of the docket records of this court.
>
> • • • • •
>
> ". . . more than five years have elapsed during which the parties have vigorously pursued their preparations for trial and massive accumulations of papers and documents already form a part of the current proceedings. To thrust all this aside *in medias res* to permit administrative intervention would not serve the orderly disposition of this litigation." *Seligson* v. *New York Produce Exchange*, BNA Antitrust Trade Reg. Rep. No. 358, p. A-6 (S.D.N.Y. 1971).

Respondents are and for over two years have been prepared to go to trial in the District Court. Resort to Commission proceedings at this time would only further impair their ability to obtain a prompt and orderly adjudication of their claims.

CONCLUSION.

The decision of the Court of Appeals is correct. For the reasons stated herein, the Chicago Mercantile Exchange's Petition should be denied.

Respectfully submitted,

JAMES E. S. BAKER
One First National Plaza
Chicago, Illinois
(312) 329-5410
Attorney for Respondents, Al Phillips, Jr., et al.

Of Counsel:
BRUCE P. BICKNER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois
(312) 329-5400

Dated: October 10, 1973

SUPPLEMENTAL APPENDIX.

RULES OF THE CHICAGO MERCANTILE EXCHANGE.

217. BUSINESS CONDUCT COMMITTEE.

A. Membership. The Chairman of the Board with the approval of the Board shall appoint from the membership five members and one alternate as a Business Conduct Committee, including a Governor as Chairman, each to be appointed to serve during the Chairman's term of office and until a new Committee is appointed and approved. A vacancy in the Committee shall be filled for the unexpired term in the same manner as provided above.

B. Qualifications of Members. No person shall serve as regular or alternate member unless and until he has first pledged to the Exchange that during the period of such service he will not publish, divulge, or make known in any manner except when reporting to the Governors or to a committee concerned with such information, or when called upon to testify in any judicial or administrative proceeding, any facts regarding the business of any person or any other confidential information which may come to the knowledge of such member in his official capacity. Violation of the pledge shall be a major offense.

C. Duties of Committee. The Committee shall determine the manner and form in which its proceedings shall be conducted. A representative of the Commodity Exchange Authority may be invited to attend any or all meetings of the Committee. The Committee shall be charged with the duty and authority to prevent manipulation of prices and the cornering of any commodity as provided in Section 5(d) of the Commodity Exchange Act, and shall also have general supervision of the business conduct of members and Clearing Members, particularly in so far as such conduct affects:

(1) Non-member customers.

(2) The public at large.

(3) The State Government.

(4) The Federal Government.

(5) Public opinion.

(6) The good name of the Exchange.

D. Performance of Duties. The Committee in performing its duties may investigate the dealings, transactions, and financial condition of members and Clearing Members, may examine their books and papers upon request, and may prescribe such capital requirements as it deems appropriate. The Committee may employ such auditors and other assistants as it may deem necessary, and all expenses incident thereto shall be payable from the funds of the Exchange. Members and Clearing Members under investigation shall be advised of the nature of the investigation and may appear before the Committee and offer such testimony, explanation, or justification as they may wish. If, as a result of any investigation, the Committee finds that a particular course of conduct is, or thereafter would be, unfair or unjust, or in violation of the law or the rules of the Exchange, or calculated to impair the good name of the Exchange, the Committee shall notify the member or Clearing Member, as the case may be in writing of its conclusions and direct such member or Clearing Member to cease and desist from such past or proposed conduct. In addition, the Committee may order such member or Clearing Member to:

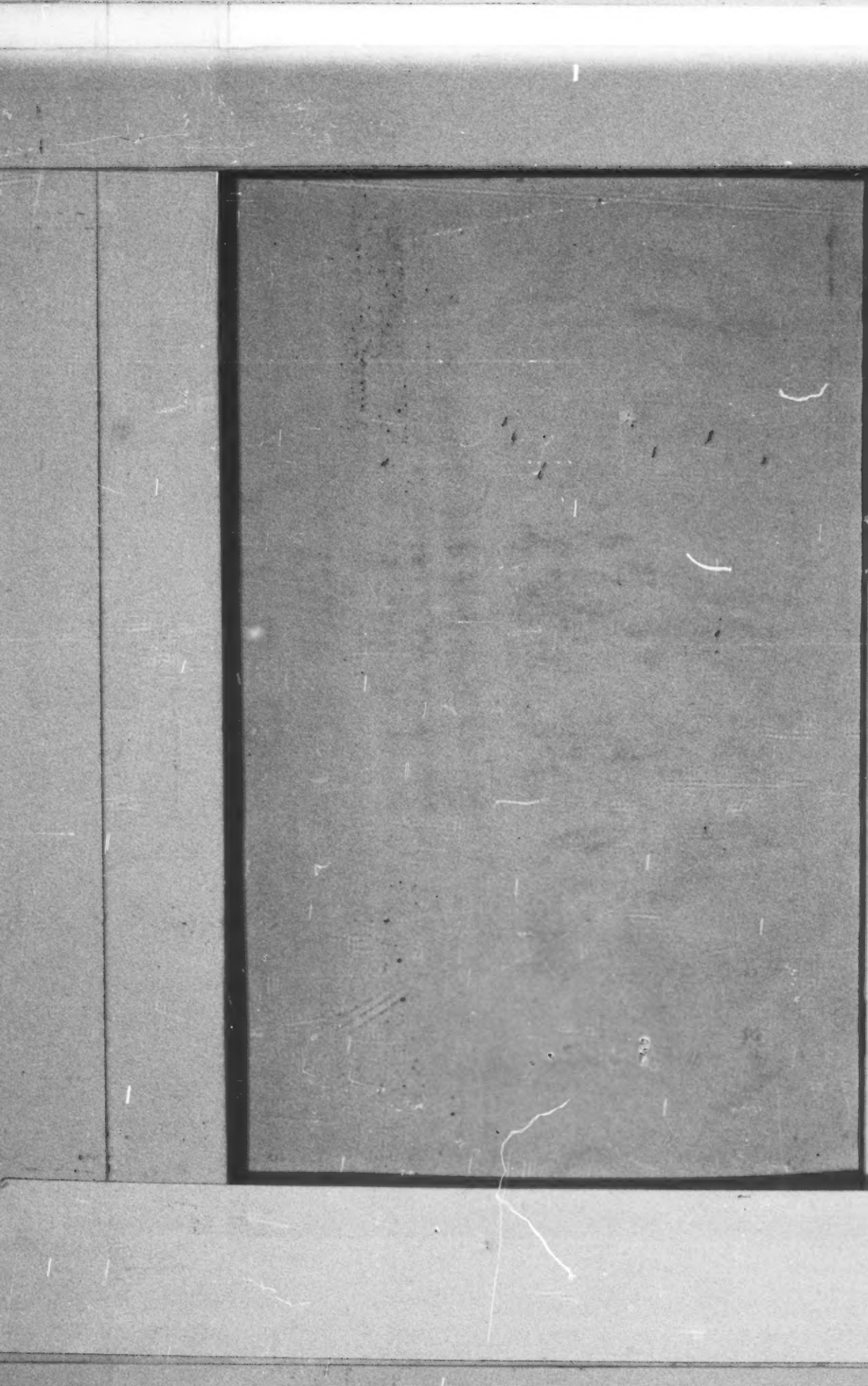
(1) Liquidate such portion of his and/or its customers' open contracts as the Committee deems necessary.

(2) Deposit such additional margins with the Exchange as determined by the Committee.

Any member or Clearing Member who fails to appear before the Committee pursuant to its request or to submit his or its books and papers to the Committee for examination, or who conducts himself or itself in violation of any order of the Com-

mittee after having been duly notified thereof, shall be charged by the Committee with an offense against the Exchange, and, if found guilty by the Board shall be either expelled or suspended.

E. Nothing in this rule shall relieve the President of his duties and responsibilities as outlined in the rules.



LIBRARY
SUPREME COURT, U. S.

FILED
NOV 10 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-241

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

DARRYL B. DEAKTOR,
Respondent,

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

AL PHILLIPS, JR., ET AL.,
Respondents.

REJOINDER OF RESPONDENTS AL PHILLIPS, JR.; ET AL. IN OPPOSITION TO THE CHICAGO MERCANTILE EXCHANGE'S PETITION FOR A WRIT OF CERTIORARI.

JAMES E. S. BAKER,
One First National Plaza,
Chicago, Illinois 60670,
(312) 329-5410,
Attorney for Respondents, Al Phillips, Jr., et al.

Of Counsel:
BRUCE P. BICKNER,
SIDLEY & AUSTIN,
One First National Plaza,
Chicago, Illinois 60670,
(312) 329-5400.

Dated: November 9, 1973.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-241

CHICAGO MERCANTILE EXCHANGE,
Petitioner,
vs.
DARRYL B. DEAKTOR,
Respondent,
and
CHICAGO MERCANTILE EXCHANGE,
Petitioner,
vs.
AL PHILLIPS, JR., ET AL.,
Respondents.

REJOINDER OF RESPONDENTS AL PHILLIPS, JR.; ET AL. IN OPPOSITION TO THE CHICAGO MERCANTILE EXCHANGE'S PETITION FOR A WRIT OF CERTIORARI.

The reply brief filed by the Petitioner Chicago Mercantile Exchange ("CME") contains a material misstatement of fact which demands correction. The CME, at page 2 of its reply brief, states that the CME's ruling of March 17, 1970 was proper because such action was taken in accordance with the

"CME's rules relating to 'emergency' situations, *i.e.*, Rules 908, 1229 and 1230."

Nothing could be further from the truth. The CME's order of March 17, 1970 which forms the basis for this lawsuit was issued by the Business Conduct Committee of the CME acting pursuant to Rule 217(D). The order specifically states "The Business Conduct Committee, at a meeting held today, has ruled as follows . . . ." (Complaint, Exhibit "A".) The members of the Business Conduct Committee present at the meeting on March 17, 1970 have likewise all testified in this proceeding that the order of March 17, 1970 was issued by their Committee pursuant to Rule 217(D) of the CME. See, for example, the testimony of Mr. William Brodsky at pages 23, 36 of his deposition. The truth is, that the emergency rules of the CME referred to in the CME's reply brief were not invoked and have no relevance whatsoever to this litigation.

Rule 908 sets forth certain situations in which the President of the CME, with the concurrence of the Clearing House Committee, the Chairman of the Board or the Chairman of the Clearing House Committee, or the Board of Governors of the CME may stop trading, limit trading to liquidation trades or specify certain price conditions that will govern trading. Both the Chairman of the Board and the President of the CME have testified that the action challenged in this lawsuit was taken by the Business Conduct Committee, and that they made no recommendations to such Committee and had no vote in determining the Business Conduct Committee's March 17, 1970 action. In the latter regard, see the deposition testimony of Leo Melamed at pages 8, 22, 27-29, 35-37 and the deposition testimony of Everette B. Harris at pages 3, 20-23. Rule 908 clearly has

no application to the procedures to be followed by or the powers of the Business Conduct Committee.

Likewise, Rule 1229 prescribes certain conditions under which the President of the CME, or a Committee consisting of the Chairman of the Board, the Chairman of the Clearing House and the President, may require additional margins. As in the case of Rule 908, this Rule has no applicability to the present controversy. The action at issue was not taken pursuant to Rule 1229 nor even by the persons empowered to act under Rule 1229.

The third rule cited by the CME, Rule 1230, is similarly inapplicable. It pertains only to certain emergency action which the Manager of the Clearing House may take if daily market fluctuations require the early posting by Clearing Members of settlement and/or initial margin checks. Such power is conferred on the Manager of the Clearing House, not the Business Conduct Committee; the powers so conferred are not those exercised by the Business Conduct Committee in its order of March 17, 1970.

The CME did not act or purport to act, in this case, pursuant to or in accordance with Rules 908, 1229, 1230 or any combination thereof. The CME acted only through its Business Conduct Committee. Rule 217(D), the only Rule involved in this litigation, prescribes certain procedures which must be followed by this Committee. In this regard the record is clear. The Business Conduct Committee, in taking its action on March 17, 1970, totally failed to provide the notice and hearing required by such Rule. In fact, the Committee acted with a complete disregard for due process and the interests of those affected by its ruling, for which conduct the CME ought be held accountable.

For the reasons stated herein and in Respondents' prior Brief, the Chicago Mercantile Exchange's Petition should be denied.

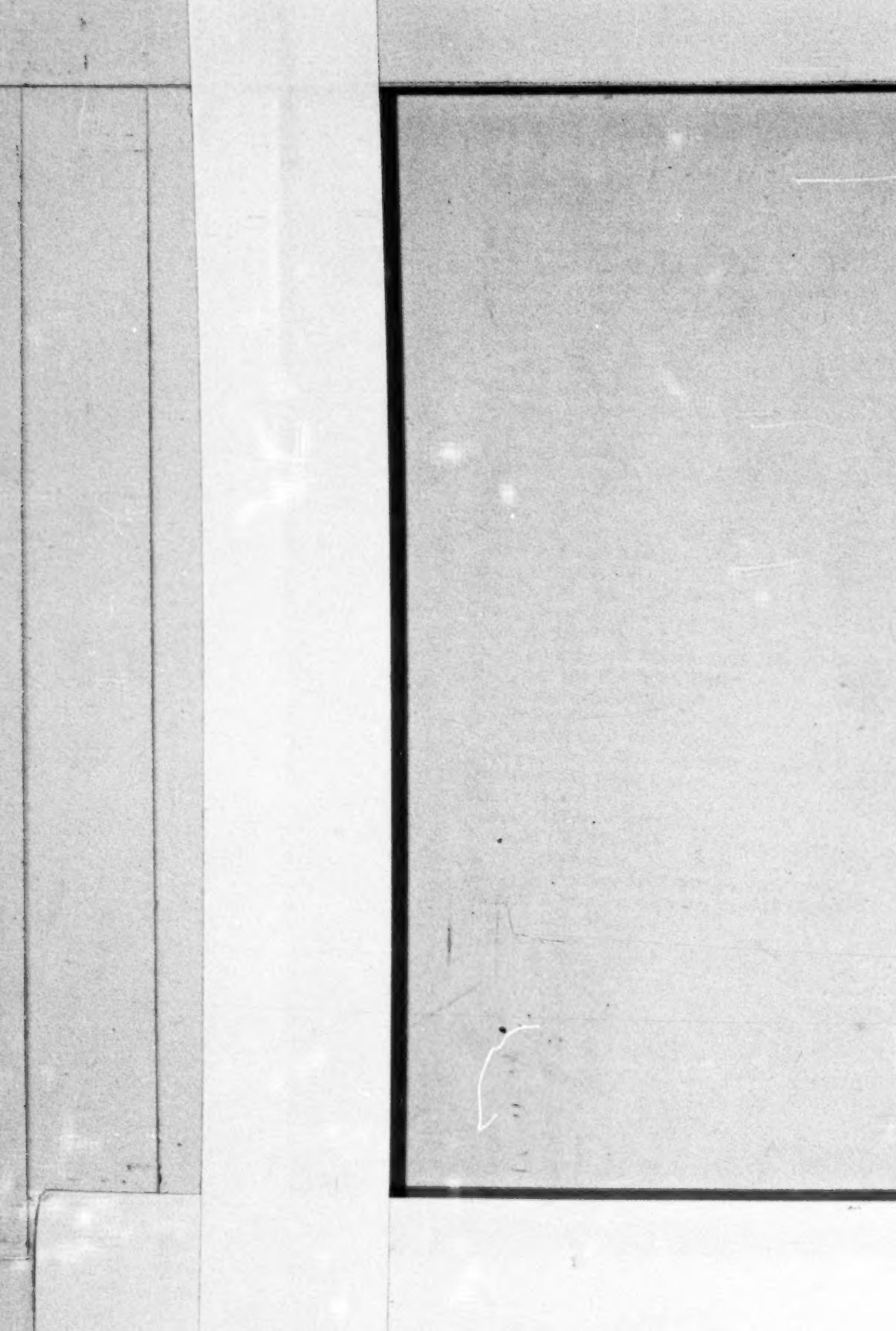
Respectfully submitted,

JAMES E. S. BAKER,
One First National Plaza,
Chicago, Illinois 60670,
(312) 329-5410,
Attorney for Respondents, Al Phillips, Jr., et al.

Of Counsel:
BRUCE P. BICKNER,
SIDLEY & AUSTIN,
One First National Plaza,
Chicago, Illinois 60670,
(312) 329-5400.

Dated: November 9, 1973.





CHICAGO MERCANTILE EXCHANGE *v.* DEAKTOR ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73-241. Decided December 3, 1973

Two suits were brought charging petitioner, the Chicago Mercantile Exchange, with, *inter alia*, violating the Commodity Exchange Act (CEA) and failure to enforce its own rules. The District Court refused petitioner's applications for stays of the suits to permit the Commodities Exchange Commission to determine initially whether the challenged actions comported with the CEA and petitioner's rules. The Court of Appeals affirmed. *Held:* The Commission, whose administrative functions appear to encompass adjudication of the charges against petitioner, should pass on those charges in the first instance. *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289.

Certiorari granted; 479 F. 2d 529, reversed and remanded.

PER CURIAM.

The petitioner, Chicago Mercantile Exchange, was sued in two separate actions in the District Court. In one, the *Phillips* suit, it was alleged that the Exchange had forced sales of futures contracts in March 1970 fresh eggs at artificially depressed market prices and had thereby monopolized and restrained commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, and had violated § 9 (b) of the Commodity Exchange Act (CEA), as amended, 82 Stat. 33, 7 U. S. C. § 13 (b), by manipulating prices of a commodity for future delivery on a contract market. The Exchange was also accused of violating § 5a of the Act, 7 U. S. C. § 7a (8), for failure to enforce one of its own rules. In the second suit, the *Deaktor* case, the Exchange was charged with violating the CEA and its own rules as a designated contract market because it had failed

to exercise due care to halt the manipulative conduct of certain of its members who allegedly had cornered the July 1970 market in frozen pork bellies futures contracts.

The Exchange defended both actions on the ground that it was faithfully discharging its statutory duty of self-regulation. It asserted that its challenged acts in the *Phillips* case were measures taken to prevent speculation in futures contracts and as such were not in violation of the CEA. Rather, they were authorized and required by the statute and hence cannot be considered within the reach of the antitrust laws. Likewise, in the *Deaktor* suit, the Exchange claimed that it had taken all proper and reasonable steps to perform its statutory responsibility to prevent manipulation.

The Exchange further urged that because the Commodity Exchange Commission had jurisdiction to determine whether the Exchange was violating the CEA or its own rules and to impose sanctions for any such offense, both suits should be stayed to permit the Commission to determine in the first instance whether or not the actions of the Exchange under scrutiny were in discharge of its proper duties under the CEA and its regulations. The District Court refused the stay, and the Court of Appeals affirmed. *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d 529 (1973). Both courts were in error.

Ricci v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973), held that an antitrust action against the Exchange should have been stayed to afford the Commodity Exchange Commission an opportunity to determine if the challenged conduct of the Exchange was in compliance with the statute and with Exchange rules. Because administrative adjudication of alleged violations of the CEA and the rules lay at the heart of the task assigned the Commission by Congress, we recognized that

the court, although retaining final authority to interpret the CEA and its relationship to the antitrust laws, should avail itself of the abilities of the Commission to unravel the intricate and technical facts of the commodity industry and to arrive at some judgment as to whether the Exchange had conducted itself in compliance with the law. An adjudication by the Commission that the actions of the Exchange were authorized or required by the CEA would not necessarily dispose of the question of immunity from antitrust liability. We nevertheless thought the considered view of the Commission would be of sufficient aid to the court that the action should not go forward without making reasonable efforts to invoke the jurisdiction of the Commission. *Id.*, at 305–306. As we did in *Ricci*,

> "we simply recognize that Congress has established a specialized agency that would determine either that a . . . rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regime . . . ." *Id.*, at 307.

In our judgment, the Court of Appeals, as in *Ricci*, should have requested the District Court to stay the proceedings in the *Phillips* case to afford an opportunity to invoke the jurisdiction of the Commission. For very similar reasons, the *Deaktor* plaintiffs, who also alleged violations of the CEA and the rules of the Exchange, should be routed in the first instance to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case.

The petition for writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEWART dissents. He would affirm the judgment substantially upon the reasoning of Judge Castle's concurring opinion in the Court of Appeals. 479 F. 2d 529, 535.

